DOCKET

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Title: Ann McLaughlin, Secretary of Labor, Petitioner
v.
Richland Shoe Company

Docketed:
March 19, 1987

Court: United States Court of Appeals
for the Third Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Ehrlich,Leon

NOTE* 1/12 Ext. to 2/20 by Brennan, J. 2/10 Further Ext. to 3/10 by Brennan, J. 3/6 Further Ext. to 3/19 by Brennan, J. cited

Entry	Date	Note	Proceedings and Orders
2	Jan 9 1987		Extension of time filed (A-508) and order granting same by Brennan, J., on 1/12/87 to February 20, 1987.
3	Feb 10 1987		Further extension of time filed and order granting same by Brennan, J., on February 11, 1987 to March 10, 1987.
4	Mar 5 1987		Further extension of time filed and order granting same by Brennan, J., on March 6, 1987 to March 19, 1987.
1	Mar 19 1987	G	Petition for writ of certiorari filed.
5	Apr 8 1987		Waiver of right of respondent Richland Shoe Co. to respond filed.
6	Apr 22 1987		DISTRIBUTED. May 14, 1987.
7	May 12 1987	P	Response requested -- CJ. (Due June 11, 1987)
9	Jun 19 1987	X	Brief of respondent Richland Shoe Company in opposition filed.
8	Jun 23 1987		DISTRIBUTED. September 28, 1987
10	Jul 30 1987		Decision of U.S. Court of Appeals, Fifth Circuit received and distributed.
11	Oct 5 1987		Petition GRANTED.
			**********
13	Nov 19 1987		Brief of petitioner Sec. of Labor filed.
12	Nov 20 1987		Joint appendix filed.
14	Nov 25 1987		Record filed.
		*	Certified copy of appendix and partial proceedings received.
16	Dec 5 1987		Order extending time to file brief of respondent on the merits until January 4, 1988.
17	Jan 4 1988		Brief of respondent Richland Shoe Co. filed.
18	Jan 4 1988		Brief amicus curiae of Equal Employment Advisory Council filed.
19	Jan 5 1988		SET FOR ARGUMENT. Wednesday, February 24, 1988. (1st case). (1 hour).
20	Jan 5 1988		CIRCULATED.
21	Feb 12 1988	X	Reply brief of petitioner Brock, Sec. of Labor filed.
22	Feb 24 1988		ARGUED.

PETITION FOR WRIT OF CERTIORARI

FILED
MAR 19 1987
JOSEPH F. SPANIOL, JR.
CLERK

86 1520

In the Supreme Court of the United States

OCTOBER TERM, 1986

WILLIAM E. BROCK, SECRETARY OF LABOR, PETITIONER

v.

RICHLAND SHOE COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Whether the court of appeals erred in holding that a violation of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. (& Supp. III) 201 *et seq.*, is "willful" within the meaning of the applicable statute of limitations, 29 U.S.C. 255(a), only where the employer, in acting contrary to the statute, knew that, or showed reckless disregard for whether, its conduct was prohibited by the FLSA.

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No.

WILLIAM E. BROCK, SECRETARY OF LABOR, PETITIONER

v.

RICHLAND SHOE COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the Secretary of Labor, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-9a) is reported at 799 F.2d 80. The opinion of the district court (App., *infra*, 10a-17a) is reported at 623 F. Supp. 667.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 22a-23a) was entered on August 26, 1986. A petition for rehearing with suggestion for rehearing en banc was denied on October 23, 1986 (App., *infra*, 24a). On January 12, 1987, Justice Brennan extended the time within which to file a petition for a writ of certiorari to February 20, 1987. On February 11, 1987, Justice Brennan further extended the time for filing a petition to March 10, 1987. On March 5, 1987, Justice Brennan further extended

the time for filing a petition to March 19, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 6 of the Portal-to-Portal Act of 1947, as amended, 29 U.S.C. 255, provides, in relevant part:

> Any action commenced on or after May 14, 1947, to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended * * *, the Walsh-Healey Act * * *, or the Bacon-Davis Act * * *—
>
> (a) if the cause of action accrues on or after May 14, 1947—may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued.

STATEMENT

1. a. The Fair Labor Standards Act of 1938 (FLSA or Act), 29 U.S.C. (& Supp. III) 201 *et seq.*, requires that covered employers adhere to certain standards in their compensation of covered employees. In particular, the Act requires the payment of at least the prescribed minimum wage, currently $3.35 an hour (29 U.S.C. 206); the payment of one and one half times the employee's regular rate for overtime hours (29 U.S.C. (& Supp. III) 207); and the payment of equal wages to men and women where required by the Equal Pay Act (29 U.S.C. 206(d)). The Act

also requires covered employers to maintain, and to make available to the Department of Labor, certain wage and hour records (29 U.S.C. (& Supp. III) 211(c)).

Any employer is subject to the FLSA's wage and hour requirements with respect to those employees who work in interstate commerce or in the production of goods for interstate commerce. Also covered by the FLSA are all employees of an "enterprise" engaged in interstate commerce or the production of goods for interstate commerce. 29 U.S.C. 206(a), 207(a)(1); see *Tony & Susan Alamo Foundation* v. *Secretary of Labor*, 471 U.S. 290, 295 n.8 (1985).[1]

Where those coverage tests are met, an employer may avoid some or all of the FLSA's requirements for some or all of its employees. The Act includes numerous partial or total exemptions, which Congress has frequently changed over the years, for particular industries or occupations. See 29 U.S.C. 213(a)(1)-(15) (exemptions from minimum wage, overtime, and Equal Pay Act requirements) and, (b)(1)-(29) (exemptions from overtime requirements).[2] Exemptions to the FLSA are construed narrowly, however,

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[1] A business is subject to "enterprise" coverage if it (i) meets the complex statutory definition of "enterprise," which excludes specified industries (29 U.S.C. 203(r)); (ii) has employees with certain connections to interstate commerce (29 U.S.C. 203 (s)); and (iii) either has an "annual gross volume of sales made or business done" that is above certain specified amounts or is engaged in certain specified types of activity (*e.g.*, a laundry business, construction, education) (*ibid.*).

[2] For example, neither the minimum wage nor overtime requirements of the Act generally apply to employees who work in "a bona fide executive, administrative, or professional capacity" or "in the capacity of outside salesman" (29 U.S.C. 213(a)(1)). The Equal Pay Act (29 U.S.C. 206(d)) remains applicable to employees who come within this exemption. See 29 U.S.C. 213(a).

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and employers bear the burden of proving entitlement to any claimed exemption. *Arnold* v. *Ben Kanowsky, Inc.*, 361 U.S. 388, 392, 394 n.11 (1960).

The FLSA may be enforced by a criminal prosecution for willfully violating the FLSA's wage and hour requirements, 29 U.S.C. 216(a); by an injunctive suit brought by the Secretary of Labor, for back pay and/or an injunction against future violations, 29 U.S.C. 217; or by suit brought by either the Secretary of Labor or affected employees[3] to recover unlawfully withheld wages and, presumptively, an equal amount of "liquidated damages," 29 U.S.C. 216(b) and (c). In the non-injunctive civil action, the employer may seek to escape all or part of the liquidated damages liability by proving that the acts or omissions giving rise to its violation were taken in good faith and with reasonable grounds for believing they were lawful under the FLSA. Where such proof is presented, the trial court has discretion to reduce or eliminate the liquidated damages portion of the award. 29 U.S.C. 260.

b. As enacted in 1938, the FLSA had no statute of limitations to govern injunctive or non-injunctive actions for unpaid minimum wages, overtime compensation, or liquidated damages. 29 U.S.C. (1940 ed.) 201 *et seq.* The courts accordingly applied state statutes of limitations to those FLSA actions. See, *e.g.*, *Donovan* v. *Shell Oil Co.*, 168 F.2d 229 (4th Cir. 1948); *Mid-Continent Petroleum Corp.* v. *Keen*, 157 F.2d 310 (8th Cir. 1946); *Loggins* v. *Steel Constr. Co.*, 129 F.2d 118 (5th Cir. 1942). In 1947, however, Congress enacted, in Section 6(a) of the Portal-to-Portal Act, ch. 52, 61 Stat. 88, a uniform two-year limitations period for such FLSA actions.

[3] The right of employees to file suit on their own behalf terminates when the Secretary sues, either to recover unpaid wages and liquidated damages or to enjoin future violations and to recover back pay. 29 U.S.C. 216(b) and (c).

Congress made extensive revisions in the FLSA in 1966. It increased the minimum wage, tightened exemptions, and expanded coverage to include more than 7 million new workers and approximately 700,000 new establishments. Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, Tits. II and III, 80 Stat. 833-841.[4] Congress also changed the statute of limitations to its present version. § 601(b), 80 Stat. 844. A cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages under the FLSA is now subject to a two-year period, "except that a cause of action aris[ing] out of a willful violation may be commenced within three years." 29 U.S.C. 255(a).[5]

2. Respondent Richland Shoe Company, a manufacturer of foot-wear and other leather products, employed certain mechanics to repair and to maintain equipment in its plant. These mechanics, though their hours fluctuated from week to week, worked on average more than 40 hours a week. Yet, contrary to the statutory requirement, 29 U.S.C. 207(a), they were paid a weekly salary on a "base week" of 48 hours, and only received one and one-half times regular pay for hours in excess of that base week. App., *infra*, 13a.

[4] See S. Rep. 1487, 89th Cong., 2d Sess. 2 (1966) (new workers); H.R. Rep. 1366, 89th Cong. 2d Sess. 18 (1966) (new workers); Wage and Hour and Public Contracts Divisions, U.S. Dep't of Labor, *Minimum Wage and Maximum Hours Standards under the Fair Labor Standards Act, Submitted to the Congress – 1968*, at 27 (increase in number of employers).

[5] This amended statute of limitations applies to causes of action under the Equal Pay Act, which is part of the FLSA (29 U.S.C. 206(d)(3)). It also applies by its terms to causes of action under the Walsh-Healey Act (41 U.S.C. (&. Supp. III) 35 *et seq.*) and the Davis-Bacon Act (40 U.S.C. 276a *et seq.*). 29 U.S.C. 255(a). In addition, the statute of limitations applies to causes of action under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. (& Supp. III) 621 *et. seq.* See 29 U.S.C. 626(e)(1). Throughout this petition, we refer to the limitations provision as the FLSA statute of limitations.

a. The Secretary brought suit for an injunction to restrain future violations of the FLSA and to recover back wages for the affected mechanics. App., *infra*, 2a. The employer defended its noncompliance with the FLSA's overtime requirements (29 U.S.C. 207(a)(1)) by invoking the statutory "Belo plan" exception, which covers certain situations where employees' work hours inescapably fluctuate both above and below 40 hours per week. 29 U.S.C. 207(f); 29 C.F.R. 778.402-778.414; see *Walling* v. *A.H. Belo Corp.*, 316 U.S. 624 (1942). The district court granted summary judgment to the Secretary, agreeing that respondent's compensation system was not a valid Belo plan, because the mechanics' hours did not fluctuate significantly below 40 hours a week. App., *infra*, 14a.[6]

Having found an FLSA violation, the district court also agreed with the Secretary that respondent's violation was "willful," so that the mechanics were entitled to three rather than two years' back wages. The court looked to the admission of respondent's vice president and general manager that he was aware that the FLSA governed overtime systems such as the one used for the mechanics, and applied the Fifth Circuit's standard for determining willfulness, which "requires nothing more than that the employer has an awareness of the possible application of the FLSA" (App., *infra*, 15a). See *Coleman* v. *Jiffy June Farms, Inc.*, 458 F.2d 1139, 1142 (5th Cir. 1971), cert. denied, 409 U.S. 948 (1972) ("the employer knew or suspected that his actions might violate the FLSA. Stated more simply, we think the test should be: Did the employer know the FLSA was in the picture?"); *Brennan* v. *Heard*, 491 F.2d 1, 3 (5th Cir. 1974) (emphasis in original) (an employer acts willfully "if he knows, or has reason to

[6] The court did not reach the "other substantial grounds asserted" by the Secretary in support of his argument that the plan was invalid. App., *infra*, 14a n.2.

know, that his conduct is *governed* by the [FLSA]"). The court enjoined future violations and ordered back pay. App., *infra*, 16a.

b. The court of appeals affirmed the district court's conclusion that respondent violated the FLSA, rejecting as "totally without merit" respondent's contentions that its plan met the Belo requirements and that the injunctive relief was inequitable. App., *infra*, 3a n.2. Nevertheless, the court of appeals vacated the district court's award of back pay, ruling that the district court had applied an incorrect standard of willfulness under 29 U.S.C. 255(a). App., *infra*, 3a n.2.

The court of appeals held that the standard applied by the district court was "wrong because it is contrary to the plain meaning of the FLSA." App., *infra*, 5a. The court found it "clear that willfulness is akin to intentionality," which, the court ruled, at a minimum "requires reckless disregard" of consequences. *Ibid.* The court stated that it knew of no legislative history sufficient to establish a congressional intent contrary to this plain meaning and that the remedial purposes of the FLSA were insufficient reason to contradict the plain meaning. *Id.* at 6a, 8a-9a. Further, the court reasoned, the standard used by the district court would make virtually all violations willful and thus would circumvent the two-tiered scheme of liability that Congress intended. *Id.* at 6a.

The court of appeals also relied on this Court's recent decision in *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111, 125-126 (1985). The Court there construed the "willful violation" prerequisite to an award of liquidated damages under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 626(b), holding that the provision required a knowing violation of, or reckless disregard for, the requirements of the ADEA. The court of appeals characterized *Thurston* as involving "a context very similar to the one at issue here." App., *infra*, 7a. It

acknowledged a conflict among the circuits on the meaning of "willful" in the FLSA statute of limitations, noting the Seventh Circuit's decision in *Walton* v. *United Consumers Club, Inc.*, 786 F.2d 303 (1986), which adopted the *Thurston* standard (see App., *infra*, 4a n.4, 6a, 7a-8a), and the acceptance by other courts of appeals of the standard applied by the district court in this case (*id.* at 4a n.4).[7] The court of appeals thus concluded that the three-year limitations period for an FLSA "willful violation" applies only if the employer "knew or showed reckless disregard for the matter of whether its conduct was prohibited by the FLSA" (*id.* at 8a (emphasis deleted)).

The court of appeals, with Judge Gibbons dissenting, subsequently denied the government's petition for rehearing. App., *infra*, 24a.

REASONS FOR GRANTING THE PETITION

The courts of appeals are in sharp conflict on the correct standard for determining when a violation of the FLSA is "willful" within the meaning of the statute of limitations governing civil actions to recover unlawfully withheld wages. The actual knowledge/reckless disregard standard adopted by the Third Circuit in this case and by the Seventh Circuit in *Walton* v. *United Consumers Club, Inc.*, *supra*, conflicts with more encompassing standards articulated by every other circuit except the Federal Circuit, which has not addressed the question. This lack of uniformity subjects employers in similar circumstances to differing periods of liability solely on the basis of their location. It also creates confusion about the types of information the Secretary of Labor must gather in pending and future investigations into FLSA violations. In addition, we think the decision by the court of appeals in this case is incorrect. Certiorari is warranted to resolve the conflict and to correct the court of appeals' unduly restrictive construction of the FLSA statute of limitations.

[7] The court also noted that the First Circuit in *Secretary of Labor* v. *Daylight Dairy Products, Inc.*, 779 F.2d 784 (1985), had refused to extend *Thurston* to the FLSA statute of limitations on the ground that the double damages provision construed in *Thurston* is punitive, while the FLSA statute of limitations provision is not. The court rejected the First Circuit's analysis on the ground that increasing an employer's risk of liability for a "willful" violation "cannot be explained as anything else but a punitive measure." App., *infra*, 8a.

1. The Third Circuit in this case and the Seventh Circuit in *Walton* both have interpreted the term "willful violation" as used in the FLSA limitations provision, 29 U.S.C. 255(a), to refer only to conduct that is knowingly or recklessly in violation of the law. Ten other courts of appeals have adopted more encompassing interpretations.

Most courts have adopted something close to the standard articulated by the Ninth Circuit in *EEOC* v. *First Citizens Bank*, 758 F.2d 397, 401, cert. denied, 474 U.S. 902 (1985): a violation is willful within the meaning of the limitations provision if the "employer knew, or should have known, that there was an appreciable possibility that the employees involved were covered by the Act." See *Nolting* v. *Yellow Freight System, Inc.*, 799 F.2d 1192, 1197, 1198 (8th Cir. 1986) (employer "knew or suspected" that its practices violated statutory requirements); *Crenshaw* v. *Quarles Drilling Corp.*, 798 F.2d 1345, 1350 & n.6 (10th Cir. 1986) (citations omitted) ("violation is willful if 'the employer knew that the Act was "in the picture" and was aware of the Act's possible application to his employees' "); *Donovan* v. *Bel-Loc Diner, Inc.*, 780 F.2d 1113, 1117 (4th Cir. 1985) (violation is willful when employer knew FLSA was " 'in the picture' and, thus, might govern the employer's conduct"); *Secretary of Labor* v. *Daylight Dairy Products Inc.*, 779 F.2d at 789 (citation omitted) (" 'the employer knew or had reason to know that the FLSA was applicable to its employment practices' "); *Brock* v. *Georgia Southwestern College*, 765 F.2d 1026, 1039 (11th Cir. 1985) (employer "knew that the Act was 'in the picture' regardless of the defendant's good faith"); *Donovan* v. *Carls Drug Co.*, 703 F.2d 650, 652 (2d

Cir. 1983) ("(1) [employers] know that their business is subject to FLSA and (2) their practices do not conform to FLSA requirements"); *Donovan* v. *KFC National Management Co.*, 682 F.2d 603, 605 (6th Cir. 1982) (citation omitted) (" 'an employer who knows he may be subject to the [FLSA] and proceeds voluntarily to engage in conduct which he knows may violate the [FLSA] has done so willfully' "); *Coleman* v. *Jiffy June Farms, Inc.*, 458 F.2d at 1142 ("the employer knew or suspected that his actions might violate the FLSA. Stated more simply, we think the test should be: Did the employer know the FLSA was in the picture?").[8]

The District of Columbia Circuit articulated a different standard in *Laffey* v. *Northwest Airlines, Inc.*, 567 F.2d 429 (1976), cert. denied, 434 U.S. 1086 (1978) (*Laffey I*). The court of appeals there stated (*id.* at 461-462 (footnote omitted)) that an employer's noncompliance is willful "[a]t the very least * * * when he is cognizant of an appreciable possibility that he may be subject to the statutory requirements and fails to take steps reasonably calculated to resolve the doubt." See also *Laffey* v. *Northwest Airlines, Inc.*, 740 F.2d 1071, 1085-1087 (D.C. Cir. 1984), cert. denied, 469 U.S. 1181 (1985) (*Laffey II*) (standard reaffirmed).[9]

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[8] Although the formulations quoted above differ in certain respects, the courts have generally viewed these formulations as representing a single standard, which we will refer to as the "appreciable possibility" standard. Because the standard was first articulated in *Coleman* v. *Jiffy June Farms, Inc.*, 458 F.2d at 1142, it has frequently been referred to as the *Jiffy June* standard.

[9] In *Hickman* v. *United States*, 10 Cl. Ct. 550, 554 (1986), the Claims Court stated that the appreciable possibility standard made sense for private employers but not for the federal government as an employer. An FLSA violation by the government, the court held, is non-willful whenever there is significant uncertainty about the FLSA's application.

Since this Court's decision in *Thurston*, the Third[10] and Seventh Circuits have applied the actual knowledge/reckless disregard standard in the statute of limitations context, while six courts of appeals have refused to do so. Three—the First, Fourth, and Tenth Circuits—have expressly found the *Thurston* standard not applicable to the FLSA statute of limitations. *Crenshaw*, 798 F.2d at 1350 n.6; *Bel-Loc Diner, Inc.*, 780 F.2d at 1117; *Daylight Dairy*, 779 F.2d at 789. Two others—the Ninth and Eleventh Circuits—have applied their pre-*Thurston* standard without discussing *Thurston*. *First Citizens Bank*, 758 F.2d at 401; *Georgia Southwestern College*, 765 F.2d at 1039. The Eighth Circuit adopted the appreciable possibility standard for the first time after *Thurston* was decided. *Nolting*, 799 F.2d at 1197, 1198.[11]

The federal government has itself taken different positions on the proper interpretation of "willful violation" as used in the FLSA statute of limitations. For example, in this case and in others, the Secretary of Labor has pressed the appreciable possibility standard. By contrast, in *Hickman* v. *United States, supra*, the United States argued for adoption of the *Thurston* standard where the government is the employer. See 10 Cl. Ct. at 553.

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[10] It is possible that the Third Circuit will apply an even stricter construction of "willful" in some cases. In a case interpreting the "willful" standard under the liquidated damages provision of the ADEA, the court recently held that in cases where employer action "consists of a decision directed at an individual," instead of the adoption of a policy, proof of some "outrageous" conduct is required. See *Dreyer* v. *Arco Chemical Co.*, 801 F.2d 651, 656-657 (3d Cir. 1986), cert. denied, No. 86-1062 (Mar. 2, 1987).

[11] The remaining four circuits with standards broader than the actual knowledge/reckless disregard standard (the Second, Fifth, Sixth, and District of Columbia Circuits) have not decided a willfulness case since *Thurston*. Accordingly, the standards articulated in *Carl's Drug* (Second), *Jiffy June* (Fifth), *KFC* (Sixth), and *Laffey* (District of Columbia) remain the governing law in those circuits.

The conflict in the courts on this issue requires resolution by this Court.

2. Contrary to the reasoning of the court of appeals, neither the word "willful" nor the phrase "willful violation" has a plain meaning that is consistent from statute to statute. Rather, as this Court has repeatedly recognized, "willful" is a word "of many meanings, its construction often being influenced by its context." *Spies* v. *United States,* 317 U.S. 492, 497 (1943); see *Screws* v. *United States,* 325 U.S. 91, 101 (1945) (opinion of Douglas, J.); *United States* v. *Murdock,* 290 U.S. 389, 394-395 (1933). Thus, in numerous cases construing "willful" or "willful violation," the Court has carefully examined the particular statutory scheme at issue to determine which meaning was required by that scheme. See, *e.g., United States* v. *Bishop,* 412 U.S. 346, 360-361 (1973); *Screws* v. *United States,* 325 U.S. at 101; *Spies* v. *United States,* 317 U.S. at 497-498; *Browder* v. *United States,* 312 U.S. 335 (1941); *United States* v. *Illinois Central R.R.,* 303 U.S. 239, 242-244 (1938); *United States* v. *Murdock,* 290 U.S. at 394-395. Accord, *United States* v. *Perplies,* 165 F.2d 874, 876 (7th Cir. 1948) ("The context of the statute in which the word 'wilful' is used is often most important.").

As the court of appeals noted, "willful" refers to an intentional state of mind, but the object of the intent—what exactly must be intended—varies from context to context. In some criminal statutes, the term means "with evil purpose, criminal intent or the like." See *United States* v. *Illinois Central R.R.,* 303 U.S. at 242. In other criminal statutes, an intent to do evil is not required. See, *e.g., Fields* v. *United States,* 164 F.2d 97, 99-100 (D.C. Cir. 1947), cert. denied, 332 U.S. 851 (1948); *American Surety Co.* v. *Sullivan,* 7 F.2d 605, 606 (2d Cir. 1925) (L. Hand, J.). In a variety of criminal statutes, all that is required is that "the act was deliberate, voluntary and intentional as

distinguished from one committed through inadvertence, accidentally or by ordinary negligence." *Nabob Oil Co.* v. *United States,* 190 F.2d 478, 480 (10th Cir.), cert. denied, 342 U.S. 876 (1951) (footnote omitted). Thus, even in criminal statutes, the term has sometimes been interpreted to mean "no more than that the person charged with the duty knows what he is doing. It does not mean that, in addition, he must suppose that he is breaking the law." *American Surety Co.* v. *Sullivan,* 7 F.2d at 606. Indeed, under a predecessor statute to the FLSA, this Court has held that an employer may be convicted of "intentionally violat[ing]" a wage and hour law merely by intending to do what the law forbids, even though the employer is ignorant of the law's requirements. *Ellis* v. *United States,* 206 U.S. 246 (1907) (Holmes, J.).

The meaning of "willful" or "willful violation" likewise varies in civil statutes. For example, in the context of the Securities Exchange Act of 1934 provision authorizing administrative measures, including revocation of registration, against brokers and dealers who have "willfully violated" specified laws (15 U.S.C. (Supp. III) 78*o*(b)(4)(D)), it has long been generally accepted that " '[a]ll that is required is proof that the broker-dealer acted intentionally in the sense that he was aware of what he was doing.' " *Arthur Lipper Corp.* v. *SEC,* 547 F.2d 171, 180, (2d Cir. 1976), cert. denied, 434 U.S. 1009 (1978) (Friendly, J.) (quoting 2 L. Loss, *Securities Regulation* 1309 (1961)).[12] In other civil statutes, such as some state

[12] Likewise, under the criminal penalty provision of the Securities Exchange Act of 1934, 15 U.S.C. (Supp. III) 78ff(a), although a wrongful purpose is required, an individual may be convicted of a willful violation of the Act, or of a rule or regulation promulgated under the Act, even if the person had no knowledge of the legal prohibition. See *United States* v. *Dixon,* 536 F.2d 1388, 1395-1398 (2d Cir. 1976) (Friendly, J.); *United States* v. *Schwartz,* 464 F.2d 499, 509-510 (2d Cir.), cert. denied, 409 U.S. 1009 (1972).

statutes penalizing an employer's willful failure to pay wages in a timely manner as required by law, "willful" has similarly been interpreted to mean only ' "[t]hat the person knows what he is doing, intends to do what he is doing, and is a free agent.' " *State* v. *Johnston*, 233 Or. 103, 108, 377 P.2d 331, 333 (1962) (quoting *Davis* v. *Morris*, 37 Cal. App. 2d 269, 274, 99 P.2d 345, 348 (1940)). In still other civil statutes whose purpose is not to penalize, but rather to compensate employees for injury, courts have sometimes held an employer liable for willfully violating a statute where he neither knows nor is reckless in failing to know of the violation. *E.g.*, *Kennerly* v. *Shell Oil Co.*, 13 Ill. 2d 431, 439, 150 N.E.2d 134, 139 (1958) (employer is liable for "willful violation" of Illinois' Scaffold Act, Mining Act, and Occupational Disease Act of 1911, whether or not he was reckless or the violation was known to him, "when by the exercise of reasonable care the existence of such dangerous conditions [producing the injury] could have been discovered and become known to him").

In short, neither the word "willful" nor the phrase "willful violation" has a single meaning readily discernible apart from the particular statute in which it is used. Thus, the court of appeals was mistaken in its view that the plain meaning of the phrase "willful violation" in the FLSA limitations provision requires adoption of the actual knowledge/reckless disregard standard. The appropriate interpretation of "willful violation" can be determined only by examining the context of the FLSA limitations provision.

3. The standard we think appropriate is based on the District of Columbia Circuit decision in *Laffey I, supra*. Under the *Laffey* standard, a violation is willful for FLSA limitations purposes if the employer "is cognizant of an appreciable possibility that he may be subject to the statutory requirements and fails to take steps reasonably

calculated to resolve the doubt" (567 F.2d at 462). In our view, an employer's violation should be held willful if the employer, recognizing it may be covered by the FLSA, acts without a reasonable basis for believing that it is complying with the statute—either because it fails to seek a reliable determination of its obligations under the FLSA, or because the advice it receives affords no reliable basis for eliminating existing uncertainties about the employer's compliance. This standard, we think, is more consonant with the intent behind the FLSA and its limitations provision than either the actual knowledge/reckless disregard standard or the appreciable possibility standard.

The FLSA was enacted for broadly remedial purposes and has long been interpreted generously towards employees. See, *e.g.*, *Tony & Susan Alamo Foundation* v. *Secretary of Labor*, 471 U.S. at 296; *Mitchell* v. *Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960); *Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697, 706-707 (1945); *Tennessee Coal, Iron & R.R.* v. *Muscoda Local 123*, 321 U.S. 590, 597 (1944); *Overnight Motor Transportation Co.* v. *Missel*, 316 U.S. 572, 576, 578 (1942). This broad purpose generally supports placing on employers, rather than on employees, the risk of error in failing to comply with FLSA requirements. As the District of Columbia Circuit noted in *Laffey I* (567 F.2d at 461), there is "no good reason for translating the employer's error into a loss of pay for the employee." On the other hand, the FLSA limitations provision, which took its present form in the Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, 80 Stat. 830 *et seq.*, clearly creates two tiers of liability. And while there is no mention of the provision in the committee reports or floor debates on the 1966 Amendments (see, *e.g.*, S. Rep. 1487, 89th Cong., 2d Sess. (1966); H.R. Conf. Rep. 2004, 89th Cong., 2d Sess. (1966); H.R. Rep. 1366, 89th Cong., 2d Sess. (1966)), there is reason to believe that Congress was attempting to

distinguish between those employers who had good reason to think they were in compliance with the FLSA and those who did not.[13] As the District of Columbia Circuit stated in *Laffey I* (567 F.2d at 460 (footnotes omitted)), "[t]here is ample room * * * for an informed belief that, with the [1966] amendments' broad expansion of the Act's coverage and resultant concern over the effect on small businessmen, an unqualified increase of the limitation period would bear too heavily upon an inevitably larger group of excusably inadvertent violators." See *Laffey II*, 740 F.2d at 1085-1087 (court reaffirms its previous analysis of legislative history).

Given this background, we think the actual knowledge/reckless disregard standard should not be transplanted from the ADEA liquidated damages provision to the FLSA limitations provision. In *Thurston*, the Court found the ADEA provision to be punitive in intent, relying on its

[13] The 1966 Amendments originated in a bill proposed by the Administration (111 Cong. Rec. 10793 (1965)), which not only would have greatly extended coverage, raised the minimum wage, and tightened exemptions, but also would have extended the FLSA statute of limitations to three years for all violations. See *Minimum Wage-Hour Amendments, 1965: Hearings on H.R. 8259 Before the General Subcomm. on Labor of the House Comm. on Education and Labor*, 89th Cong., 1st Sess. 7 (1965). Hearings on the bill were conducted by the House Labor Subcommittee. Members of Congress and various employers expressed concern about the impact of the proposed amendments on small businesses; they also complained, citing the expansion of coverage and the complexity of the FLSA's coverage provisions, that the three-year statute of limitations would be unfair to many employers who had good reason for believing (mistakenly) that they were in compliance. See, *e.g.*, *id.* at 394, 533-534, 980, 1014, 1151, 1118-1119, 2050, 2059, 2076-2077, 2241-2242, 2249-2250); see also S. Rep. 1487, *supra*, at 75-77. The bill reported from the House Labor Subcommittee, H.R. 10275, 89th Cong., 1st Sess. (1965), contained the two-tier limitations provision that was subsequently enacted. There was no accompanying explanation of the change from the Administration bill. As noted above, there was likewise no explanation of the provision in the rest of the legislative process.

origin in the 90th Congress as a substitute for a criminal penalty provision. See 469 U.S. at 125-126. By contrast, there is no indication that the FLSA limitations provision—enacted by a previous Congress (the 89th) as part of a different statute[14]—was intended to be punitive. Moreover, whereas in the *Thurston* context the willfulness determination affects only non-compensatory liquidated damages, the consequences of the willfulness determination under the FLSA limitations provision are broader, and include determination of how much, if any, compensatory back pay employees are to receive. In light of this effect of the limitations provision on compensatory relief, the broadly remedial purpose of the FLSA as a whole, and the indications that Congress's purpose was to cushion the impact of liability only on those employers who reasonably believed they were in compliance, we think that something short of actual knowledge or recklessness is suf-

[14] In its brief on the merits in *Thurston*, the United States mistakenly suggested that the two provisions were adopted by the same Congress (Br. at 33). In accord with this suggestion, the United States, in arguing that the then-uniformly accepted appreciable possibility construction of willfulness under the statute of limitations provision, 29 U.S.C. 255, should be applied to Section 7(b) of the ADEA, 29 U.S.C. 626(b), also relied on the " 'natural presumption that identical words used in different parts of the same Act are intended to have the same meaning' " (Br. at 33 (citation omitted)). This Court rejected our reading of the ADEA provision but reserved the question of the proper interpretation of the FLSA limitations provision. *Thurston*, 469 U.S. at 127-128. As noted above, the FLSA limitations provision, though applicable in ADEA actions (29 U.S.C. 626(e)), was enacted by a different Congress from that which enacted the ADEA; and whereas this Court held in *Thurston* that the ADEA liquidated damages provision is punitive in intent, the FLSA limitations provision is not. For those reasons, and for the others set forth above, the statutory context relevant to interpreting the FLSA limitations provision is different from that which was at issue in *Thurston*, and the result should accordingly be different.

ficient to require the employer to bear the risk of error. An employer's failure to exercise reasonable care in determining its obligations, or its receipt of advice that does not afford a reliable basis for the employer to be confident that it is in compliance, should render the employer's violation of the FLSA willful for purposes of the FLSA statute of limitations.

If the actual knowledge/reckless disregard standard gives too little recognition to the employee-protection policies behind the FLSA, the appreciable possibility standard, at least in its most common formulations, gives too little effect to Congress's express intent to create two tiers of liability in the FLSA limitations provision. Among employers eventually found to have violated the FLSA, there are probably few who cannot be charged with awareness that there was an appreciable possibility that they were covered by the statute. Moreover, the appreciable possibility standard might work to employees' disadvantage: by deeming a violation willful regardless of any legal advice received, this standard reduces employers' incentive to seek reliable legal advice once they are aware that the FLSA is in the picture. The standard we propose avoids both of those problems. It does not collapse into a single tier of liability; and as Congress apparently intended, it encourages responsible efforts by employers and protects those employers who reasonably rely on sound assurances that they are in compliance with the statute.[15]

[15] Indeed, an employer may seek from the Wage and Hour Division of the Department of Labor an opinion on the application of the FLSA to a specified set of facts. See App., *infra*, 16a. Reliance on such an opinion in certain circumstances protects the employer against any liability. 29 U.S.C. 259(a); 29 C.F.R. 790.13-790.19. In addition, several courts of appeals following the "appreciable possibility" standard have stated that, even if an employer does not qualify for this immunity from liability, good faith reliance on a government opinion may be a defense to the charge that a violation was willful. See *Marshall* v. *Root's Restaurant, Inc.*, 667 F.2d 559, 561 (6th Cir. 1982); *Marshall* v. *Union Pacific Motor Freight Co.*, 650 F.2d 1085, 1092-1093 (9th Cir. 1981).

For these reasons, the court below erred in requiring that an employer act with a specific intent to violate the FLSA or with "reckless disregard" of statutory requirements before the three year limitations period for willful violations may apply.

CONCLUSION

The petition for a writ of certiorari should be granted.
Respectfully submitted.

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MARCH 1987

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 85-1305

WILLIAM E. BROCK, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, APPELLEE

v.

RICHLAND SHOE COMPANY, APPELLANT

On Appeal from the United States District Court for the Eastern District of Pennsylvania (D.C. Civ. No. 84-3821)

Argued Jan. 7, 1986

[Filed Aug. 26, 1986]

OPINION OF THE COURT

Before: WEIS, HIGGINBOTHAM, BECKER, *Circuit Judges*

BECKER, *Circuit Judge.*

This case was brought by the Secretary of Labor to enjoin defendant Richland Shoe Company from violating the overtime and recordkeeping provisions of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.*, and from withholding unpaid overtime compensation owed to several employees. This appeal, from an order granting the Secretary's motion for summary judgment and awarding an injunction and backpay, requires us to

construe the word "willful" in the statute of limitations section of the Portal-to-Portal Act, 29 U.S.C. § 255(a), applicable in FLSA proceedings. A "willful" violation adds one year to the statute of limitations, potentially rendering a willful violator liable for substantial additional sums.

The district court applied the standard of willfulness announced in *Coleman* v. *Jiffy June Farms, Inc.*, 458 F.2d 1139 (5th Cir. 1972), *cert. denied*, 409 U.S. 948 (1972) and adopted by several courts of appeals, *see infra* n.4. Under this standard, the action of an employer is willful when the "employer knew or suspected that his actions might violate the FLSA. Stated most simply . . . Did the employer know the FLSA was in the picture?" *Id.* at 1142. For the reasons set forth below, we conclude that a more rigorous standard is appropriate. Specifically, we hold that for the purposes of 29 U.S.C. § 255(a), a violation of the relevant sections of the FLSA is willful if the employer knew or showed reckless disregard for the matter of whether its conduct was prohibited by the FLSA. Although we shall affirm the district court's decision in favor of the Secretary in all other respects, we shall vacate the district court's order with respect to the statute of limitations issue and remand the case for recalculation of the amount of back overtime pay due.

I.

Richland is a Pennsylvania corporation that manufactures footwear and other leather products in Womelsdorf, Pennsylvania. The Secretary brought this action in the United States District Court for the Eastern District of Pennsylvania on August 8, 1984 to enjoin Richland from violating the overtime and recordkeeping provisions of the FLSA and from withholding unpaid overtime compensation owed to several employees. These employees are seven mechanics whose duties primarily involve the repair and

maintenance of equipment at Richland's manufacturing plant.[1]

On February 25, 1985, the Secretary moved for summary judgment. In support of this motion, the Secretary submitted depositions of the office manager and the general manager of Richland; payroll records and computations based thereon; and the Department of Labor Wage and Hour Division's coefficient table that was used to compute the amount of overtime compensation due. While the parties disagreed on the conclusions to be drawn from these materials, there was no dispute regarding the underlying facts and records. The district court granted summary judgment in favor of the Secretary on April 17, 1985 and enjoined Richland from violating the overtime sections (29 U.S.C. §§ 207, 215(a)(2)) and recordkeeping requirements (29 U.S.C. §§ 211(c), 215(a)(5); 29 C.F.R. 516) of the FLSA. The order also required Richland to pay back overtime pay to the mechanics in the sum of $11,084.26 plus interest.

II.

Although Richland raises five contentions on appeal, only one merits our attention, Richland's claim that the district court applied an improper standard of "willfulness" under 29 U.S.C. § 255(a) in calculating back overtime pay awards under the FLSA.[2] That section establishes a two-

[1] Richland paid the mechanics a weekly salary based on a 48-hour week. For time worked in excess of 48 hours per week, the mechanics received roughly time and one-half pay. This action seeks recovery of overtime pay for the hours worked in excess of 40 hours per week without proper overtime compensation.

[2] Richland also contends that: (1) summary judgment was inappropriate because there were disputed issues of material fact; (2) Richland's wage plan falls within an exception to the FLSA commonly known as the Belo exception, *see Walling* v. *A.H. Belo Corp.*, 316 U.S. 624 (1942); (3) the injunction was inequitable; and (4) the amount of back overtime pay awarded should be subject to a set-off. We find these contentions to be totally without merit.

year statute of limitations for an employer's violation of FLSA standards unless the employer's violation was "willful," in which case the statute of limitations is three years.[3] This court has not previously had occasion to determine what constitutes willfulness under this section. As noted above, the district court applied the *Jiffy June* standard, under which the action of an employer is willful when the "employer knew or suspected that his actions might violate the FLSA. Stated most simply . . . Did the employer know the FLSA was in the picture?" 458 F.2d at 1142.[4]

In this case, Richland's vice president and general manager stated in his deposition that he knew that the FLSA applied to overtime pay schemes such as that used

[3] 29 U.S.C. § 255 provides in relevant part:

> Any action commenced on or after May 14, 1947, to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended . . .
>
> (a) if the cause of action accrues on or after May 14, 1947—may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, *except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued*: . . . (emphasis added)

[4] Several courts of appeals have adopted the *Jiffy June* standard. *See Donovan* v. *Bel-Loc Diner, Inc.*, 780 F.2d 1113, 1117 (4th Cir. 1985); *Secretary of Labor* v. *Daylight Dairy Products, Inc.*, 779 F.2d 784 (1st Cir. 1985); *Donovan* v. *Simmons Petroleum Corp.*, 725 F.2d 83 (10th Cir. 1983). *But see Walton* v. *United Consumers Club, Inc.*, 786 F.2d 303, 308-11 (7th Cir. 1986) (A violation is willful if employer showed a disregard for the governing statute and an indifference to its requirements). *See also Marshall* v. *Union Pacific Motor Freight Co.*, 650 F.2d 1085, 1092 (9th Cir. 1981) ("A violation is willful when the employer was, or should have been, cognizant of an appreciable possibility that the employees involved were covered by the statutory provisions."); *Laffey* v. *Northwest Airlines, Inc.*, 567 F.2d 429, 459-63 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978) (discussing but reserving issue).

for the mechanics. Because of this admission, the district court concluded that willfulness was established under the *Jiffy June* standard. Accordingly, the court awarded damages based on the three-year limitations period.

III.

We believe that the *Jiffy June* standard is wrong because it is contrary to the plain meaning of the FLSA. Although the meaning of willful is not fixed and determinate, it is clear that willfulness is akin to intentionality. A willful act requires a deliberate effort, more than mere negligence. Webster's *New Collegiate Dictionary* 1331 (1979) defines "willful" to mean "done deliberately: intentional." The "words of statutes . . . should be interpreted where possible in their ordinary, everyday senses." *Malat v. Riddell*, 383 U.S. 569, 571 (1966) (per curiam). At the very least a willful act requires reckless disregard of the consequences: there is no special, legal definition of the term.[5]

[5] The term "willful" is widespread throughout our jurisprudence, and courts have interpreted the term variously, depending upon the circumstances. *See* 45 & 46 *Words and Phrases* (West 1970 & Supp. 1986) (devoting over 300 pages to "willful"). In the criminal context, for example, a different standard may be appropriate. *See, e.g., Longview Refining Co. v. Shore*, 554 F.2d 1006, 1012 (Temp. Emer. Ct. App. 1977), *cert. denied*, 434 U.S. 836 (1977). Despite this allowable variation, no court or commentator of whom we are aware has ever adopted so lax a definition of "willfulness," in any other context as has the *Jiffy June* court. Courts and commentators have consistently stated that willfulness requires an intent to bring about certain ends or a reckless disregard with respect to those ends. *See, e.g., United States v. Murdock*, 290 U.S. 389 (1933) (misdemeanor violation of Revenue Acts of 1926 and 1928); *United States v. Illinois Central R. Co.*, 303 U.S. 239 (1938) (violation of statute regulating transportation of cattle); *Alabama Power Co. v. Federal Energy Regulatory Comm'n*, 584 F.2d 750 (5th Cir. 1978) (failure to file report under Federal Power Act, 16 U.S.C. § 825n(a)); *F. X. Messina*

The *Jiffy June* "in the picture" analysis is far removed from a consideration of whether the employer deliberately or recklessly violated the FLSA. It would permit the extension of the statute of limitations when the employer was merely negligent with regard to overtime and recordkeeping provisions of FLSA. Thus, it appears clear that the *Jiffy June* standard is contrary to the plain meaning of the statute.

Even a statute's plain meaning can be overcome by clear evidence that Congress intended otherwise. *Paskel v. Heckler*, 768 F.2d 540, 543-44 (3d Cir. 1985). However, neither the *Jiffy June* court, nor any of the courts that have endorsed or followed *Jiffy June*, nor the parties before us in this case have presented evidence of legislative intent sufficient to bear the "extraordinarily heavy burden on the party who seeks to vary it by reference to legislative history." *Id.* To the contrary, it appears that the *Jiffy June* standard would frustrate legislative intent: because the standard is so lax that virtually any employer could be found to have acted willfully, the two-tiered scheme of liability that Congress evidently intended to implement would be eviscerated. *Walton v. United Consumers Club, Inc.*, 786 F.2d 303, 310 (7th Cir. 1986). *Cf. Trans World Airlines, Inc. v. Thurston*, ___ U.S. ___, 105 S.Ct. 613, 625 (1985) (discussed *infra* at 8-9).

The conclusion is thus inescapable that the plain meaning of the statute must control. *See Glenn Elec. Co., Inc. v. Donovan*, 755 F.2d 1028, 1033 (3d Cir. 1985). To the extent that the district court defined "willful" to include actions that were merely negligen: it was in error.

Construction Corp. v. *Occupational Safety & Health Review Comm'n*, 505 F.2d 701 (1st Cir. 1974) (violation of safety provisions of Occupational Safety and Health Act, 29 U.S.C. § 666(a)). That is the standard that we adopt here. *See infra* at 9.

IV.

The Supreme Court's recent decision in *Trans World Airlines, Inc. v. Thurston*, 105 S.Ct. 613 (1985), provides further support for our conclusion, for in that case the Supreme Court refused to adopt the *Jiffy June* willfulness standard in a context very similar to the one at issue here. *Thurston* involved a determination of willfulness for the purpose of assessing double damages under the Age Discrimination in Employment Act ("ADEA"). 26 U.S.C. § 626(b). The employees argued that the *Jiffy June* standard should be adopted and thus that the employer should be liable for double damages if he knew that the ADEA was "in the picture." 105 S. Ct. at 625. The Supreme Court refused to adopt the *Jiffy June* standard, stating:

> [I]t would be virtually impossible for an employer to show that he was unaware of the Act and its potential applicability. Both the legislative history and the structure of the statute show that Congress intended a two-tiered liability scheme. We decline to interpret the liquidated damages provision of ADEA § 7(b) in a manner that frustrates this intent.

Id. at 625 (footnote omitted).

Instead, the Supreme Court affirmed the appellate court's formulation of the willfulness standard according to which the relevant question is whether " 'the employer . . . knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA.' " 105 S. Ct. at 624, quoting *Air Line Pilots Ass'n v. Trans World Airlines*, 713 F.2d 940, 956 (2d Cir. 1983). The Court stated: "[This] definition of 'willful' . . . is consistent with the manner in which this Court has interpreted the term in other criminal and civil statutes." 105 S. Ct. at 624. *Thurston* does not control the case at bar because it involved the interpretation of a different statute. It provides persuasive precedent, however, as does *Walton v. United*

Consumers Club, Inc., supra. We therefore adopt the same test for willfulness that the Supreme Court adopted in *Thurston*: an employer has acted "willfully" under 29 U.S.C. § 255(a) if it knew or *showed reckless disregard for the matter of whether* its conduct was prohibited by the FLSA. *See supra* n.5.

V.

We wish finally to address two objections to our disposition. The first objection would rely upon the First Circuit's recent case of *Secretary of Labor v. Daylight Dairy Products, Inc.*, 779 F.2d 784, 789 (1st Cir. 1985), in which the court refused to extend *Thurston* to section 255(a). The court distinguished *Thurston* by noting that whereas *Thurston* involved whether double damages would be awarded against an employer, a question with punitive overtones, section 255(a) is a "non-punitive statute of limitations."

We disagree with the First Circuit because increasing an employer's liability based on his willfulness is essentially punitive. Indeed, the increased risk of liability cannot be explained as anything else but a punitive measure. The harm to the workers on account of willful violations is neither more difficult to detect nor more severe than it would be were the violations not willful. Thus, the extension of liability is clearly based on Congress' perception that willful violations are more culpable than negligent ones. The extension is therefore a punitive measure, and no different in this regard from the double damages provision considered in *Thurston*.

The second objection is offered by the Secretary, who argues that the *Jiffy June* standard is preferable to the one we adopt here because the *Jiffy June* standard furthers the remedial ends of the FLSA by making recovery of wrongfully withheld wages easier for the employee. This argument is far too broad and could be used to undercut

any statute of limitations. A statute of limitations in a damage action always strikes a balance between concerns of proof and timeliness on the one hand and recovery of damages on the other. The Secretary offers no evidence that Congress intended to strike the balance in a manner contradicting the plain meaning of the statute of limitations.

VI.

In sum, we are persuaded to adopt the *Thurston* approach rather than the *Jiffy June* standard for interpreting "willful" in 29 U.S.C. § 255(a). We shall therefore affirm the judgment of the district court in all respects except for its determination of the amount of back overtime pay due, and in that respect we shall vacate the judgment of the district court and remand the case for reconsideration.[6]

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

---

[6] The district court's damage figure was apparently based on three years' back overtime pay. On remand the court must apply the standard for willfulness as articulated herein to determine whether the statute of limitations should be lengthened to three years. It may then recalculate the damages as necessary. We offer no view as to whether Richland's behavior satisfies the standard set forth today.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 84-3821

RAYMOND J. DONOVAN, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR

v.

RICHLAND SHOE COMPANY

Apr. 15, 1985
[Filed Apr. 17, 1985]

MEMORANDUM AND ORDER

HUYETT, J.

Presently before me in this Fair Labor Standards Act ("FLSA") case is plaintiff's motion for summary judgment. For the reasons set forth below, this motion will be granted.

BACKGROUND

Defendant Richland Shoe Company ("Richland") is a manufacturer of footwear and other leather products. Plaintiff has brought this action seeking an injunction against further violations of the FLSA and for restitution on behalf of seven of Richland's employees. All seven of these employees are mechanics whose duties include repairing and maintaining equipment at Richland's plant. It is admitted that all of these employees work, on average, in excess of forty hours a week.

Section 7(a)(1) of the FLSA requires employers to pay all employees at least "one and one-half times the regular" pay rate for hours worked over forty in a given workweek. 29 U.S.C. § 207(a)(1).[1] This provision, like the FLSA in general, is "remedial and humanitarian in purpose" and must not be interpreted or applied in a "narrow grudging manner." *Tennessee Coal Co. v. Muscoda Local 123*, 321 U.S. 590, 597 (1944). There is, however, a narrow exception to the general proscriptions of § 7(a)(1). 29 U.S.C. § 207(f). This exception, enacted in response to the Supreme Court's decision in *Walling v. A.H. Belo Co.*, 316 U.S. 624 (1942), allows an employer to modify the otherwise applicable overtime provisions of the FLSA. Congress, the Court, and the Secretary have described a number of requirements for such "Belo" plans. They are:

1. The employment must be pursuant to a bona fide contract or agreement.
2. The duties of the employees must necessitate workweeks which fluctuate both above and below forty hours per week.
3. The contract or agreement must specify the regular rate of pay, which is not less than the minimum wage, and compensation at not less than time and one-half that regular rate for all hours worked over the maximum workweek.

---

[1] Section 7(a)(1) provides:

> (1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

29 U.S.C. § 207(a)(1).

4. The contract or agreement must also provide a weekly guaranty of pay for not more than sixty hours per week.

29 U.S.C. § 207(f); *see* 29 C.F.R. § 778.405-778.413; *Donovan v. Brown Equip. & Serv. Tools*, 666 F.2d 148, 153 (5th Cir. 1982). The employer has the burden of proving that all elements are present in order to come within the exception. *Brown Equip.*, 666 F.2d at 153. Belo plans are to be narrowly construed against the employer asserting them, *Id.*, and must be considered in light of their purposes. "These plans secure employees whose work necessitates wide and unpredictable fluctuations in hours against 'short' paychecks in weeks when they work very few hours. A fixed wage gives such employees 'the security of a regular weekly income' so that they can operate on a stable budget." *Id.* at 153. (*quoting Walling v. A.H. Belo*, 316 U.S. at 635). Obviously, Belo plans are not allowable merely because they allow an employer to work employees forty hours a week without paying them time and one-half.

In the present motion, plaintiff asserts that Richland's putative Belo plan fails to satisfy any of the four requirements listed above. Rule 56 of the Federal Rules of Civil Procedure provides that a trial court may enter summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). Inferences to be drawn from underlying facts contained in the evidentiary sources submitted to the trial court must be viewed in the light most favored to the party opposing the motion and doubts as to the existence of a genuine issue of material fact are to be resolved against the moving party. *Hollinger v. Wagner Mining and Equipment Co.*, 667 F.2d 402, 405 (3d Cir. 1981). In the present case, I believe

that plaintiff has met its burden of showing that there exists no genuine issue of fact requiring the validity of the defendant's Belo plan. I will therefore grant summary judgment in favor of plaintiff.

DISCUSSION

Although plaintiff asserts that defendant's plan fails to satisfy any of the necessary elements of a Belo plan, I need not consider all of its claims in order to grant summary judgment in its favor. I believe that there can exist no issue of fact regarding the second requirement of § 7(f): that the workweek of the employees fluctuates above and below forty hours per week as a necessary result of the work performed.

The employees in question are all mechanics. They work on a forty-eight hour "base week." That is, they were paid a weekly salary for all hours worked up to forty-eight hours per week. Marburger Deposition at 7; Isenberg deposition at 30. Above forty-eight hours per week, the mechanics were paid at a "half time" rate. Marburger deposition at 9, 25; Isenberg deposition at 32. There can be no question that the hours worked by these employees fluctuated widely from week to week. The Act and the regulations require more than mere fluctuation, however. They require that the hours fluctuate both above *and below* forty hours a week. *See* 29 C.F.R. § 778.406; *Foremost Dairies Inc. v. Wirtz*, 381 F.2d 653, 660-61 (5th Cir. 1967), *cert. denied*, 390 U.S. 946 (1968).

The record in this case discloses that there is very little fluctuation below forty hours a week for the employees in question. Although I need not determine the exact number of workweeks below forty hours, I can conclude that there is no doubt that the number of such weeks is relatively very small. Each of the seven employees at issued had a number of workweeks during the relevant period in which he worked less than forty hours. The vast majority of

these "short" weeks are, however, explained by the fact that the week included a holiday or a vacation day or that the employee performed non-mechanic work during the week. The plaintiff estimates that only two percent of the mechanics' workweeks fell below forty hours. I have examined the employees work records carefully. *See* Exhibit 1 to depositions of Marburger and Isenberg. I have concluded after this review that any fluctuation below forty hours is insignificant.

Defendant has argued, based on a separate breakdown of the hours of the employees, that between three and twenty-two percent of the relevant workweeks were shorter than forty hours. *See* Exhibit three to the depositions of Marburger and Isenberg. The reliance on this breakdown is, however, misplaced. The breakdown lists all weeks in which the work hours are less than forty hours for whatever reason. Thus, it takes no account of holiday and vacation days or weeks in which an employee had non-mechanic hours. The requirements of § 7(f) are not met if the fluctuations below forty hours result from vacations, holidays, illnesses or personal reasons. *Brown Equip.*, 666 F.2d at 154.

I believe that the amount of fluctuation here cannot be considered significant enough to validate defendant's Belo plan. In *Brown Equipment* for example, the Fifth Circuit held that no valid Belo plan existed where the employees' weekly hours were less than forty in only approximately five percent of the total number of weeks. *Id.* at 154. The number of weeks worked under forty hours in this case simply cannot be considered significant enough to allow the employer to utilize the Belo exception.[2]

---

[2] Because I have concluded that defendant's plan did not involve a work situation in which the work weeks of the employees fluctuated both above and below forty hours per week as a result of nature of the work performed, I need not reach the other substantial grounds asserted by plaintiff in support of its argument that the plan was invalid.

Defendant has raised the defense of the statute of limitations in response to this motion. Under the FLSA an action is barred unless brought within two years of the date the action accrued unless the actions of the employer were willful. 29 U.S.C. § 225(a) [*sic*]. The Fifth Circuit has held that an action is willful when "there is substantial evidence in the record to support a finding that the employer knew or suspected that his actions might violate the FLSA. Stated most simply, we think the test should be: Did the employer know the FLSA was in the picture?" *Coleman v. Jiffy June Farms, Inc.*, 458 F.2d 1139, 1142 (5th Cir. 1972).

This standard requires nothing more than that the employer has an awareness of the possible application of the FLSA. *Id.; Castillo v. Givens*, 704 F.2d 181, 193 (5th Cir. 1983). "An employer acts willfully and subjects himself to the three year liability if he knows, or has reason to know, that this conduct is *governed* by the FLSA." *Brennan v. Heard* 491 F.2d 1, 3 (5th Cir. 1974) (emphasis in original). *See also Donovan v. Sabine Irrigation Co., Inc.*, 695 F.2d 190, 196 (5th Cir. 1983).

In the present case, the vice president and general manager of the defendant was aware that the FLSA existed and that it governed overtime systems such as that used for the Richland mechanics. Isenberg deposition at 30-31. Thus, although Isenberg did not state that he thought that the system used was contrary to the provisions of the FLSA, he did state that he knew that the FLSA applied. I believe that this admission is sufficient to satisfy the liberal willfulness requirement under the FLSA. It is clear from Isenberg's statements that he was aware that the FLSA controlled the payment of wages and over-

time at Richland. I believe that the inference that he was aware that the FLSA set certain requirements for overtime and wages is inescapable. Moreover, as the plaintiff points out, there are available means through which an employer can ascertain the legality of a particular system before litigation is commenced. Following a wage and hour division opinion regarding a compensation system shields an employer from back wage liability.

The last issue presented in the present motion is the relief sought by the plaintiff. Defendant argues that an injunction enjoining future violations and ordering backpay is not appropriate in this case.

Backpay injunctions are intended to serve two broad purposes. The first is to compensate the damaged employees. The second is to correct a continuing offense against the public interest. In the present case, the employees involved have not received the wages due them under the FLSA.[3] It is irrelevant to argue, as Richland does, that the employees got a "fair" wage for which they contracted. The fact remains that the FLSA guarantees that these employees will receive a certain wage for work in excess of forty hours per week. Even if Richland acted in complete good faith in setting up the overtime system for its mechanics, the fact that its employees did not receive the time and one-half due to them under the FLSA would remain the same.

Defendant argues that the equities of the present situation weigh against the issuance of an injunction. Specifically, it argues that the employees involved were paid for weeks in which they worked less than forty hours, were given holiday and vacation days, that one of the employees was paid for fourteen weeks of disability, and that they received bonuses. I view these factors as irrele-

[3] Under section 16(b) of the FLSA, the employee's right to sue for backwages is extinguished once the Secretary of Labor has brought a suit for an injunction.

vant to the present controversy. If there was a violation of the FLSA—and I have so concluded—benefits paid or given to the mechanics, even those given in lieu of the statutorily required wages, are not material. Defendant violated the FLSA, [and] whether it envisioned the other payments as part of the total compensation package to its employees does not change the fact that the mechanics were not given the time and one-half for overtime work mandated by the FLSA in the absence of a valid Belo plan.

An appropriate order follows.

/s/DANIEL H. HUYETT, 3RD

Daniel H. Huyett, 3rd, *Judge*

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 84-3821

RAYMOND J. DONOVAN, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR

v.

RICHLAND SHOE COMPANY

ORDER

Now, April 15, 1985, upon consideration of the plaintiff's motion for summary judgment, the response thereto, memoranda of law submitted by the parties and for the reasons set forth in the accompanying memorandum, IT IS ORDERED that:

1. Plaintiff's motion for summary judgment is GRANTED.

2. Judgment is entered in favor of plaintiff and against defendant in accordance with the attached judgment.

/s/DANIEL H. HUYETT, 3RD
Daniel H. Huyett, 3rd, *Judge*

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 84-3821

RAYMOND J. DONOVAN, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR, PLAINTIFF,

v.

RICHLAND SHOE COMPANY, DEFENDANT.

[Apr. 15, 1985]

JUDGMENT

In accordance with the Court's Order granting summary judgment, it is ORDERED, ADJUDGED, AND DECREED that defendant, its officers, agents, servants, employees, and all persons acting or claiming to act in its behalf and interest be, and they hereby are, permanently enjoined and restrained from violating the provisions of sections 7, 11(c), 15(a)(2) and 15(a)(5) of the Fair Labor Standards Act of 1938, as amended, (29 U.S.C. 201, *et seq.*), hereinafter called the Act, in any of the following manners:

(1). Defendant shall not, contrary to Section 7 of the Act, employ any of its employees in any workweek who are engaged in commerce or in the production of goods for commerce, or employed in an enterprise engaged in commerce or in the production of goods for commerce, within the meaning of the Act, for workweeks longer than the hours now, or which in the future become, applicable under Sections 7 and 15(a)(2) of the Act, unless the said employees receive compensation for their employment in excess of the prescribed hours at rates not less than one and one-half times the employees' regular rates.

(2). Defendant shall not fail to make, keep, and preserve adequate records of its employees and of the wages, hours, and other conditions and practices of employment maintained by it, as prescribed by the Regulations issued pursuant to Sections 11(c) and 15(a)(5) of the Act and found at 29 C.F.R. Part 516.

Further, the Court finding, that backwage compensation is due certain employees in the amount of $11,084.26 plus interest at the adjusted prime rate for each employee from the time such amounts became due, it is:

ORDERED, ADJUDGED, AND DECREED that the defendant is restrained from withholding the payment of the aforesaid backwage compensation to its employees and is directed to make payment of the said compensation as hereafter specified.

The provisions of this order relative to backwage payments shall be deemed satisfied when defendant delivers to plaintiff's representatives a certified check in the amount of $11,084.26 plus interest. Neither defendant nor any one on its behalf shall directly or indirectly solicit or accept the return or refusal of any sums paid as backwages under this Judgment. Plaintiff shall distribute the proceeds of the check to the employees involved, or to their estates, if that is necessary, and any sums not distributed to the employees named herein, or to their personal representatives because of inability to locate the proper persons or because of such persons' refusal to accept such sums, shall be deposited with the Clerk of the Court who shall forthwith deposit such money with the Treasurer of the United States pursuant to 28 U.S.C. §§ 2041 and 2042.

It is FURTHER ORDERED, ADJUDGED, AND DECREED that the costs of this action shall be taxed

against defendant and plaintiff shall bear no portion of defendant's costs.

Dated: April 15, 1985

/s/DANIEL H. HUYETT, 3RD

Daniel H. Huyett, 3rd
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 85-1305

WILLIAM E. BROCK, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR

v.

RICHLAND SHOE COMPANY, APPELLANT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Civ. No. 84-3821)

[Aug. 26, 1986]

JUDGMENT

Present: WEIS, HIGGINBOTHAM, BECKER, *Circuit Judges*

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel January 7, 1986.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered April 17, 1985, be, and the same is hereby affirmed in all respects except insofar as it determined the amount of back overtime pay due, in that respect the said judgment is vacated and the cause re-

manded to the said district court for reconsideration in light of the opinion of this Court.

ATTEST:

/s/BETTY J. ROBINSON
Betty J. Robinson
Deputy Clerk

August 26, 1986

Certified as a true copy and issued in lieu
of a formal mandate on October 31, 1986.

Test: M. ELIZABETH FERGUSON

Chief Deputy Clerk,
United States Court of Appeals,
for the Third Circuit.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 85-1305

RAYMOND J. DONOVAN, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR, APPELLEE

v.

RICHLAND SHOE COMPANY, APPELLANT

SUR PETITION FOR REHEARING

Present: ALDISERT, *Chief Judge,* SEITZ, ADAMS, GIBBONS, WEIS, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, *Circuit Judges*

The petition for rehearing filed by William E. Brock, Secretary of Labor, United States Department of Labor, *appellee* in the above entitled case, having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is DENIED. Judge Gibbons would grant the petition for rehearing.

BY THE COURT:

/s/ EDWARD R. BECKER
Circuit Judge

DATED: OCT 23, 1986

APPENDIX F

RELEVANT STATUTES

29 U.S.C. 215 provides, in relevant part:

(a) After the expiration of one hundred and twenty days from June 25, 1938, it shall be unlawful for any person—

(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 206 or section 207 of this title, * * *;

(2) to violate any of the provisions of section 206 or section 207 of this title, * * *.

29 U.S.C. 216 provides, in relevant part:

(a) Fines and imprisonment

Any person who willfully violates any of the provisions of section 215 of this title shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

(b) Damages; right of action; attorney's fees and costs; termination of right of action

Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. * * * An action to recover the liability

prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. * * * The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection * * *.

(c) Payment of wages and compensation; waiver of claims; actions by the Secretary; limitation of actions

The Secretary is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under section 206 or section 207 of this title, and the agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any right he may have under subsection (b) of this section to such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages. The Secretary may bring an action in any court of competent jurisdiction to recover the amount of unpaid minimum wages or overtime compensation and an equal amount as liquidated damages. The right provided by subsection (b) of this section to bring an action by or on behalf of any employee to recover the liability specified in the first sentence of such subsection and of any employee to become a party plaintiff to any such action shall terminate upon the filing of a complaint by the Secretary in

an action under this subsection in which a recovery is sought of unpaid minimum wages or unpaid overtime compensation under sections 206 and 207 of this title or liquidated or other damages provided by this subsection owing to such employee by an employer liable under the provisions of subsection (b) of this section, unless such action is dismissed without prejudice on motion of the Secretary. Any sums thus recovered by the Secretary of Labor on behalf of an employee pursuant to this subsection shall be held in a special deposit account and shall be paid, on order of the Secretary of Labor, directly to the employee or employees affected. Any such sums not paid to an employee because of inability to do so within a period of three years shall be covered into the Treasury of the United States as miscellaneous receipts. In determining when an action is commenced by the Secretary of Labor under this subsection for the purposes of the statutes of limitations provided in section 255(a) of this title, it shall be considered to be commenced in the case of any individual claimant on the date when the complaint is filed if he is specifically named as a party plaintiff in the complaint, or if his name did not so appear, on the subsequent date on which his name is added as a party plaintiff in such action.

29 U.S.C. 217 provides:

The district courts, together with the United States District Court for the District of the Canal Zone, the District Court of the Virgin Islands, and the District Court of Guam shall have jurisdiction, for cause shown, to restrain violations of section 215 of this title, including in the case of violations of section 215(a)(2) of this title the restraint of any withholding of payment of minimum wages or overtime compensation found by the court to be due to employees under this chapter (except sums which employees are barred from recovering, at the time of the

commencement of the action to restrain the violations, by virtue of the provisions of section 255 of this title).

29 U.S.C. 260 provides:

In any action commenced prior to or on or after May 14, 1947 to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended [29 U.S.C. 201 et seq.], if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216 of this title.

The Age Discrimination in Employment Act of 1967 (ADEA) (29 U.S.C. 626), provides in relevant part:

(b) * * * Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: *Provided*, That liquidated damages shall be payable only in cases of willful violations of [the ADEA].

* * * * *

(e)(1) Sections 255 and 259 of this title shall apply to actions under [the ADEA].

U.S. GOVERNMENT PRINTING OFFICE: 1987—191-483/40239

OPPOSITION

BRIEF

Supreme Court, U.S.
FILED
JUN 19 1987
JOSEPH F. SPANIOL, JR.
CLERK

86 1520

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

WILLIAM E. BROCK, Secretary of Labor,
Petitioner

vs.

RICHLAND SHOE COMPANY

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT
IN OPPOSITION

Alfred W. Crump, Jr., Esquire
Leon Ehrlich, Esquire
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WARD & CRUMP
520 Washington Street
P.O. Box 1496
Reading, PA 19603

Telephone: (215) 376-6794

QUESTION PRESENTED

Whether the Secretary of Labor has established sufficient grounds to support his Petition for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Third Circuit.

TABLE OF AUTHORITIES

CASES: PAGE

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NO.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

WILLIAM E. BROCK, Secretary of Labor,
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RICHLAND SHOE COMPANY

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT
IN OPPOSITION

STATUTORY PROVISION INVOLVED

Section 6 of the Portal-to-Portal Act of 1947, as amended, 29 U.S.C. 255, provides, in relevant part:

> "Any action commenced on or after May 14, 1947, to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended***,
> (a) if the cause of action accrues on or after May 14, 1947 - may be commenced within two years after the cause of

action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued."

STATEMENT OF THE CASE

The Secretary filed a Complaint against the Respondent alleging violation of the overtime compensation section of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. (& Supp. III) 201 et seq. The Act requires that covered employers pay one and one half times the employee's regular rate for hours worked overtime. As noted above, the Portal-to-Portal Act provides that a cause of action for unpaid overtime under the FLSA is subject to a two-year period, "except that a cause of action aris[ing] out of a willful violation may be commenced within three years." 29 U.S.C. 255(a).

Respondent employed mechanics to

repair and to maintain machinery in its plant where foot-wear was manufactured. It was determined by the District Court that the Respondent had violated the provisions of the FLSA by paying a weekly salary on a base week of 48 hours and paying one and one-half times regular pay for hours in excess of that base week. (13a)

From a judgment entered against it by the District Court for the Eastern District of Pennsylvania the Respondent appealed. The Court of Appeals for the Third Circuit, while dismissing other grounds of the appeal, sustained the Respondent's position that the applicable statute of limitations was two years; hence, the Secretary could not seek payment of overtime reimbursement beyond that period. The Petitioner seeks a review of the judgment of the Court of Appeals as to its ruling on that issue,

in which determination the Court of Appeals adopted as the test of willfulness a requirement of intentionality, of a deliberate effort, more than mere negligence. The District Court had applied as the standard for determining willfulness nothing more than that the employer had an awareness of the possible application of the FLSA.

REASONS FOR DENYING THE PETITION

1. The Secretary advances as one of the reasons for the granting of the Petition the need to resolve conflicts as to the standard to be used in determining the existence of willfulness as it pertains to the limitations governing actions under the FLSA. Petitioner argues that conflict among the circuits creates confusion about the type of information the Secretary must gather in pending and future investigations into FLSA violations. This argument should

not be given weight since the conflict is, in part, the creation of the Secretary who acknowledges that "The federal government has itself taken different positions on the proper interpretation of 'willful violation' as used in the FLSA statute of limitations." (Petitioner's Brief, p.11). Further, until the brief filed in support of the instant Petition, the Secretary did not argue the Laffey (Laffey v Northwest Airlines, Inc. 567 F.2d 429) case; on the contrary, the Jiffy June (Coleman vs Jiffy June Farms, Inc. 458 F.2d 1139) case was still the basis for Petitioner's case. The Secretary, at this late stage of the proceedings should not be permitted to raise additional issues which were not presented to either the District Court or to the Court of Appeals.

2. The Petitioner is not seeking

to reverse the view of the Court of Appeals and to restore the view of the District Court, rather he is arguing for a third view: that of the Laffey case. It would appear that in a sense the government is rendering the issue in the instant case moot and is seeking by this petition to litigate and to establish as the rule of the case that which does not appear in the case. It is respectfully submitted that certiorari may not be granted to give the Secretary an opportunity to present what really are abstract and academic questions. Courts have uniformly refused to adjudicate a cause which no longer exists and this Court should therefore deny the Petition.

3. However, even by Laffey standards, there is still no willfulness shown. As a matter of fact, the Secretary does not in any manner point to the record to establish a violation using

this guide. The Secretary points to a rule of law but to not one shred of evidence to meet the requirement of that rule. The Petitioner, arguing that the appropriate standard is that established in Laffey states that: "Under the Laffey standard, a violation is willful for FLSA limitations purposes if the employer 'is cognizant of an appreciable possibility that he may be subject to the statutory requirements and fails to take steps reasonably calculated to resolve the doubt'". (Petitioner's brief, pages 14,15) In the instant case the employer did take steps not only to resolve any doubt that it was subject to the Act, but used the government coefficient table to calculate the overtime pay. The error in the Secretary's position is the attempt to use the Laffey case as a springboard for further restriction: "In our view,

an employer's violation should be held willful if the employer, recognizing it may be covered by the FLSA, acts without a reasonable basis for believing that it is complying with the statute - either because it failed to seek a reliable determination of its obligations under the FLSA or because the advice it receives affords no reliable basis for eliminating existing uncertainties about the employer's compliance". (Petitioner's brief, p. 15) That may be what the Secretary seeks as the law but is not what is established by the Laffey case. Respondent was acting with a reasonable basis that it was complying with the statute. The Court of Appeals, in effect, recognizes that the Respondent was acting in good faith in an attempt to fulfill its obligations under the Act by using the Department of Labor, Wage and Hour Division's coefficient table

(Government Exhibit 4) to compute the amount of overtime compensation due.(3a) In its opinion, the Court of Appeals states:

> The second objection is offered by the Secretary, who argues that the Jiffy June standard is preferable to the one we adopt here because the Jiffy June standard furthers the remedial ends of the FLSA by making recovery of wrongfully withheld wages easier for the employee. This argument is far too broad and could be used to undercut any statute of limitations. A statute of limitations in a damage action always strikes a balance between concerns of proof and timeliness on the one hand and recovery of damages on the other. The Secretary offers no evidence that Congress intended to strike the balance in a manner contradicting the plain meaning of the statute of limitations. (8a,9a)

4. In any event, it is respectfully submitted that the Court of Appeals decision is correct. As pointed out by that court:

> A willful act requires a deliberate effort, more than mere negligence. Webster's New Collegiate Dictionary 1331 (1979) defines "willful" to mean "done deliberately:

> intentional." The "words of statutes...should be interpreted where possible in their ordinary, everday senses." Malat v. Riddell, 383 U.S. 569, 571 (1966) (per curiam). At the very least a willful act requires reckless disregard of the consequences: there is no special, legal definition of the term.

The Court of Appeals in further support of its determination quotes from the case of Trans World Airlines, Inc. v Thurston, 469 U.S. 111(1985):

> '[I]t would be virtually impossible for an employer to show that he was unaware of the Act and its potential applicability. Both the legislative history and the structure of the statute show that Congress intended a two-tiered liability scheme. We decline to interpret the liquidated damages provision of ADEA in a manner that frustrates this intent.' (7a)

CONCLUSION

Respondent respectfully requests that the Writ of Certiorari be denied.

Respectfully submitted,

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LEON EHRLICH, ESQUIRE
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Reading, PA 19603

Telephone: (215) 376-6794

JOINT APPENDIX

FILED
NOV 20 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1520

In the Supreme Court of the United States

OCTOBER TERM, 1987

DENNIS E. WHITFIELD, DEPUTY SECRETARY OF LABOR,
PETITIONER

v.

RICHLAND SHOE COMPANY

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED MARCH 19, 1987
CERTIORARI GRANTED OCTOBER 5, 1987

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

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• The district court's memorandum and order, order granting summary judgment, and judgment permanently enjoining violations of the Fair Labor Standards Act and restraining the withholding of payment of back wage compensation are printed in the appendix to the petition for a writ of certiorari and are not included here. Likewise, the court of appeals' judgment, opinion, and order denying petition for rehearing are printed in that appendix and not reproduced here.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 84-3821

RAYMOND J. DONOVAN, SECRETARY OF LABOR
UNITED STATES DEPARTMENT OF LABOR

v.

RICHLAND SHOE COMPANY

DATE	EVENT*
08/08/84	Complaint filed; summons sent.
08/17/84	Answer filed; issue joined.
08/21/84	Summons returned.
10/09/84	Order rescheduling 10/05/84 conference for 11/02/84.
11/05/84	Report of pretrial conference filed.
11/05/84	Order regarding dates for trial, completion of discovery and pretrial proceedings and conference.
12/19/84	Stipulation to amend answer filed.
12/19/84	Amended answer filed.
01/09/85	Plaintiff's motion for extension of time to comply with pretrial requirements filed.
01/16/85	Order amending 11/06/84 [sic] order, cancelling trial date and setting dates for discovery and summary judgment motions.
02/14/85	Plaintiff's motion for suspension of pretrial schedule filed.
02/20/85	Order that counsel for plaintiff file motion for summary judgment with the court by 02/25/85.

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* Docket entries are taken from the district court docket sheet, reprinted in C.A. App. 2a-3a.

DATE	EVENT
02/25/85	Plaintiff's motion for summary judgment and supporting brief filed.
02/28/85	Exhibits one through five in support of plaintiff's motion for summary judgment filed.
03/08/85	Defendant's answer to motion for summary judgment and supporting brief filed.
03/18/85	Plaintiff's reply to defendant's answer to motion for summary judgment filed.
04/17/85	Court's memorandum, order granting summary judgment to plaintiff, and order permanently enjoining defendant from violating the Fair Labor Standards Act and restraining the withholding of payment of back wage compensation to its employees filed.
05/09/85	Defendant's notice of appeal and motion for supersedeas filed.
05/23/85	Copy of transcript purchase order filed.
05/24/85	Completion of record for purposes of appeal.
06/04/85	Order denying defendant's motion for supersedeas filed.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 85-1305

WILLIAM E. BROCK, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR

v.

RICHLAND SHOE COMPANY, APPELLANT

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

(D.C. Civ. No. 84-3821)

DATE	EVENT
08/26/86	Opinion of the court of appeals and judgment affirming in part and vacating and remanding in part.
10/23/86	Order denying petition for rehearing.
10/31/86	Judgment issued in lieu of formal mandate.

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION FILE NO. 84-3821

RAYMOND J. DONOVAN, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR, PLAINTIFF,

v.

RICHLAND SHOE COMPANY, A CORPORATION; DEFENDANT.

FILED AUG. 8, 1984

COMPLAINT

Plaintiff, Raymond J. Donovan, Secretary of Labor, United States Department of Labor, brings this action to enjoin the defendant from violating the provisions of Sections 7(a)(1), 11(c) and 15(a)(2) and 15(a)(5) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. § 201, *et seq.*), hereinafter referred to as the Act, including the restraint of the withholding of any overtime compensation found by the Court to be due to any of the employees of Defendant pursuant to the Act, and for interest on those wages.

I

Jurisdiction of this action is conferred upon the Court by Section 17 of the Act.

II

Defendant Richland Shoe Company is, and at all times hereinafter mentioned was, a corporation with an office and place of business located at 30 N. 3rd Street, Womelsdorf, Pennsylvania 19567, within the jurisdiction of this Court, where it is engaged in manufacture of shoes and boots.

III

The business activities of the defendant, as described herein, are related and performed through a unified operation or common control for a common business purpose and constitute an enterprise within the meaning of Section 3(r) of the Act.

IV

At all times hereinafter mentioned, Defendant has employed and is employing employees in and about its place of business in the activities of said enterprise engaged in commerce or in the production of goods for commerce, including employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce. Said enterprise, at all times hereinafter mentioned, has had an annual gross volume of sales made or business done in an amount not less than $250,000. Therefore, the said employees are employed in an enterprise engaged in commerce or in the production of goods for commerce within the meaning of Section 3(s)(1) of the Act as amended.

V

Defendant has, in many workweeks, repeatedly violated, and is violating the provisions of Sections 7 and 15(a)(2) of the Act by employing many employees engaged in commerce or in the production of goods for commerce, for workweeks longer than those prescribed in Section 7 of the Act without compensating said employees for their employment in excess of the prescribed hours in said workweeks at rates not less than one and one-half times the regular rates at which they were and are employed.

VI

Defendant has repeatedly violated and is violating the provisions of Sections 11(c) and 15(a)(5) of the Act, in that it has failed to make, keep, and preserve adequate and accurate records of its employees and of the wages, hours and other conditions of employment which it maintains, as prescribed by the Regulations issued and found at 29 CFR Part 516; more specifically, the records kept by the defendant failed to show adequately and accurately, among other things, the hours worked each workday, the total hours worked each workweek, the regular rate of pay, the basis upon which wages were paid, the total straight-time earnings for each workweek, and/or the total overtime compensation for each workweek, with respect to many of its employees.

VII

Defendant has since March 1982 repeatedly violated the aforesaid provisions of the Act, and a Judgment permanently enjoining and restraining the violations hereinabove alleged is specifically authorized by Section 17 of the Act.

WHEREFORE, cause having been shown, Plaintiff prays Judgment permanently enjoining and restraining the Defendant, its officers, agents, servants, employees, and those persons in active concert or participation with it from violating the provisions of Sections 7, 11(c), 15(a)(2) and 15(a)(5) of the Act, and for such other and further relief as may be necessary and appropriate including the restraint of any withholding of backwages found to be due, under the Act, to Defendant's employees together with interest thereon at the maximum rate set by law from the date such backwages became due until the date back wages are finally paid.

FURTHER, Plaintiff prays that this Honorable Court award costs in his favor.

FRANCIS X. LILLY
Solicitor of Labor

MARSHALL H. HARRIS
Regional Solicitor

LINDA M. HENRY
Attorney

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215-596-5175
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United States Department of Labor

Attorneys for Plaintiff.

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION FILE NO. 84-3821

RAYMOND J. DONOVAN, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR, PLAINTIFF,

v.

RICHLAND SHOE COMPANY, A CORPORATION; DEFENDANT.

ANSWER TO COMPLAINT

I. Admitted.
II. Admitted.
III. Admitted.
IV. Admitted.

V. Denied. On the contrary, Defendant has not repeatedly violated and is not violating the provisions of Sections 7 and 15(a)(2) of the Act and is not employing many employees engaged in commerce or in the production of goods for commerce, for workweeks longer than those prescribed in Section 7 of the Act without compensating said employees for their employment in excess of the prescribed hours in said workweeks at rates not less than one and one-half times the regular rates at which they were and are employed.

VI. Denied. On the contrary, the Defendant has not repeatedly violated and is not violating the provisions of Sections 11(c) and 15(a)(5) of the Act, and is not failing to make, keep, and preserve adequate and accurate records of its employees and of the wages, hours and other conditons of employment which it maintains, as prescribed by the Regulations issued and found at 29 CFR Part 516; and denied that the records kept by the Defendant fail to show

adequately and accurately, among other things, the hours worked each workday, the total hours worked each workweek, the regular rate of pay, the basis upon which wages were paid, the total straight-time earnings for each workweek, and/or the total overtime compensation for each workweek, with respect to many of its employees; on the contrary, the records of the Defendant do accurately reflect the foregoing.

VII. Denied. On the contrary, Defendant has not repeatedly since March 1982, or at any other time or times, violated the aforesaid provisions of the Act, and denied that under the circumstances a Judgment permanently enjoining and restraining the violations hereinabove alleged is authorized by Section 17 of the Act.

WHEREFORE, no cause having been shown for the relief prayed, the Defendant requests that the Complaint be dismissed forthwith.

/s/ LEON EHRLICH
Leon Ehrlich, Esquire
Attorney for Defendant
Attorney I.D. No. 09071

COMMOWNWEALTH OF PENNSYLVANIA:

ss:

COUNTY OF BERKS :

PAUL ISENBERG, being duly sworn according to law, deposes and says that he is the Vice President of Richland Shoe Company, the Defendant herein, and that as such Vice President is authorized to take this Affidavit on behalf of the said Defendant, and that the facts set forth in the within Answer are true and correct to his knowledge, information and belief.

RICHLAND SHOE COMPANY

by: /s/ PAUL ISENBERG
Paul Isenberg
Vice President

Sworn to and subscribed
before me this 15th day of August,
1984, A.D.

/s/ RAE E. ARNAT
Notary Public
My Comm. Expires: 1/29/87 (seal)

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 84-3821

RAYMOND J. DONOVAN, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR, PLAINTIFF,

v.

RICHLAND SHOE COMPANY, A CORPORATION; DEFENDANT.

STIPULATON

It is hereby stipulated and agreed between the attorneys for the respective parties in the above entitled suit that the Defendant shall be allowed to file forthwith its Amended Answer, a receipt of copy of which is hereby acknowledged by counsel for Plaintiff.

Dated at Reading, Pennsylvania, December 18, 1984.

/s/ LINDA M. HENRY
Attorney for Plaintiff

LEON EHRLICH
Attorney for Defendant

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION FILE NO. 84-3821

RAYMOND J. DONOVAN, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR, PLAINTIFF,

v.

RICHLAND SHOE COMPANY, A CORPORATION; DEFENDANT.

FRIST AMENDED ANSWER TO COMPLAINT

I. Admitted.
II. Admitted.
III. Admitted.
IV. Admitted.

V. Denied. On the contrary, Defendant has not repeatedly violated and is not violating the provisions of Sections 7 and 15(a)(2) of the Act and is not employing many employees engaged in commerce or in the production of goods for commerce, for workweeks longer than those prescribed in Section 7 of the Act without compensating said employees for their employment in excess of the prescribed hours in said workweeks at rates not less than one and one-half times the regular rates at which they were and are employed.

VI. Denied. On the contrary, the Defendant has not repeatedly violated and is not violating the provisions of Sections 11(c) and 15(a)(5) of the Act, and is not failing to make, keep, and preserve adequate and accurate records of its employees and of the wages, hours and other conditions of employment which it maintains, as prescribed by the Regulations issued and found at 29 CFR Part 516; and denied that the records kept by the Defendant fail to show

adequately and accurately, among other things, the hours worked each workday, the total hours worked each workweek, the regular rate of pay, the basis upon which wages were paid, the total straight-time earnings for each workweek, and/or the total overtime compensation for each workweek, with respect to many of its employees; on the contrary, the records of the Defendant do accurately reflect the foregoing.

VII. Denied. On the contrary, Defendant has not repeatedly since March 1982, or at any other time or times, violated the aforesaid provisions of the Act, and denied that under the circumstances a Judgment permanently enjoining and restraining the violations hereinabove alleged is authorized by Section 17 of the Act.

WHEREFORE, no cause having been shown for the relief prayed, the Defendant requests that the Complaint be dismissed forthwith.

AFFIRMATIVE DEFENSE–STATUTE OF LIMITATIONS

VIII. Defendant affirmatively alleges that Plaintiff's right to maintain this action is barred by the Statute of Limitations of the Fair Labor Standard Act of 1938, as amended (29 U.S.C. § 201, *et. seq.*) more than two (2) years having elapsed between the date Plaintiff's alleged cause of action arose and the date Plaintiff filed its Complaint herein.

WHEREFORE, Defendant requests that the Complaint be dismissed forthwith.

DATED: Dec 18, 1984 /s/ LEON EHRLICH

Leon Ehrlich, Esquire
Attorney for Defendant
Attorney I.D. No. 09071

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 84-3821

RAYMOND J. DONOVAN, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR, PLAINTIFF

v.

RICHLAND SHOE COMPANY, DEFENDANT

FILED MAY 9 1985

NOTICE is hereby given that Richland Shoe Company, Defendant above-named, hereby appeals to the United States Court of Appeals for the Third Circuit from the Final Judgment entered in this action on the 17th day of April, 1985.

DATED: May 9, 1985

/s/ LEON EHRLICH
Leon Ehrlich, Esquire
Attorney for Defendant
Attorney I.D. No. 09071
146 North Sixth Street
Post Office Box 1281
Reading, Pennsylvania 19603
(215) 376-1525

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 84-3821

RAYMOND J. DONOVAN, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
PLAINTIFF

v.

RICHLAND SHOE COMPANY, A CORPORATION,
DEFENDANT.

Oral depositions of
SUSAN MARBURGER and PAUL ISENBERG

TAKEN:	Bar Association Building Court Street Reading, Pennsylvania	December 18, 1984 Tuesday 1:30 p.m.

APPEARANCES:

LINDA M. HENRY, ESQ. 3535 Market Street Room 14480, Gateway Building Philadelphia, Pennsylvania 19104	Attorney for Plaintiff
EHRLICH & EHRLICH, ESQS. 146 North Sixth Street P.O. Box 1281 Reading, Pennsylvania 19603 BY: LEON EHRLICH, ESQ.	Attorney for Defendant

[3] PROCEEDINGS

Ms. Henry: For the Plaintiff Department of Labor, Linda Henry, United States Department of Labor, 3535 Market Street, Room 14480, Philadelphia, Pennsylvania, 19104, telephone 215-596-5175.

Mr. EHRLICH: Leon Ehrlich representing the Defendant, 146 North Sixth Street, P.O. Box 1281, Reading, Pennsylvania, 19603, 215-376-1525.

Ms. HENRY: At this time I would like [to] know if you would have any problem waiving, reading, signing, filing?

MR. EHRLICH: No problem.

SUSAN MARBURGER, having been duly sworn by Gwen A. Leary, Notary Public, was examined and testified as follows:

EXAMINATION BY MS. HENRY:

Q Could you give your name and business address?

A Susan Marburger, 30 North Third Street, Womelsdorf, PA, 19567.

Q What is your current position?

A Office manager, accountant.

Q Where do you hold that job?

A At Richland Shoe Company.

Q How long have you held that position? [4]

A A year and four months.

Q What are your duties in that job?

A I oversee the payroll, the billing, accounts payable, the monthly financial statements and also customer service and the production flow down to the plant of the piecework material.

Q And would your duty include preparing the payroll for people defined as mechanics for Richland Shoe?

A Yes.

Q I would like to show you some documents and I think you might have the originals here. What I am showing you are copies.

Do you recognize those Government proposed Exhibit 1?

A Yes, individual employee's earnings.

Q Yes?

A I believe it is the year 1982 and '83.

Q And do you recall forwarding some of those documents to me?

A Yes.

Q Where are these payroll records taken from? On what are they based?

A These are taken from the actual time cards.

[5] Q And to the best of your knowledge, are they accurate records?

A Yes.

MS. HENRY: I would like to give them to the court reporter to be attached as Government Exhibit 1.

(Government Exhibit 1, payroll records, are received and marked for Identification.)

Q At this time I would like to show what I propose to have marked as Government Exhibit 2, and ask you if you recognize those documents?

A Yes.

Q And could you explain what they are?

A They were prepared by me after Mr. Marks, the Department of Labor representative, was in our office.

Q Did you prepare them pursuant to his instructions?

A Yes.

Q Did you forward them to the Department of Labor at his instruction?

A Yes, I forwarded it to him.

Q What were his instructions?

A He asked me to go back to the period that he was asking for, March '82 to March '84, and he had asked me to figure the coefficient of any hours they had worked between 40 and 48 hours.

[6] Q What did he ask you to do with the coefficient?

A To figure it out according to the—this form that we had been using previously to that.

Q Was he asking you for, in his opinion, to figure out the overtime pay?

A According to his opinion, yes.

MS. HENRY: I would like to mark this as Government Exhibit 2.

(Government Exhibit 2, figures on overtime pay, are received and marked for Identification.)

Q I would like to ask you if you recognize proposed Government Exhibit 3?

A Yes.

Q And could you explain what that is, please?

A This was requested later to be filled in after we had gotten—I don't remember exactly. I believe Paul at one point had requested me to do this.

It is figuring out the exact hours that each of the mechanics had worked during the same period of time, whether it was nine hours or six hours.

Q How did you prepare them?

A Off the time cards.

Q To the best of your recollection, are they [7] accurate?

A Far as I am aware.

Q Did you ever have any oral contact with the mechanics? Did you have occasion to talk to them?

A Rare.

Q Did you ever have reason to discuss the basis of their pay with them?

A No.

Q Are you aware of anyone who would have had such occasion to discuss the basis of their pay with them?

A Mr. Isenberg.

Q I would like to ask you some questions about the overtime structure. Were the mechanics paid a salary for any time worked up until 48 hours and including 48 hours.

A The way their, quote, salary they were receiving was based on 52 hours, which included 40 hours of regular time and eight hours of overtime, which would have been half time.

Q And did you use any particular tables for that particular time, for 48 hours or below?

A It was—that was discussed between Paul and if—we did it this way to come up—say if it was—I don't remember the exact anymore what $6 would have [8] been. But if it came out to 52 hours, for example, at $6 an hour would have been three something for the week.

Q So you would have the salary and that would be the 52 hours?

A No, it was figured the other way on the 52.

Q Which came first, the hourly rate or the salary?

A The hourly rate came first. I was just using $6 as an example.

Q I was trying to understand which came first. Did each mechanic have a precise hourly rate?

A Yes.

Q For premium pay that was for hours over 48, how was that based?

A That was based on the schedule which was a coefficient.

Q Could you explain the schedule you are talking about?

A It is the form WH-134 and if the—say he had two hours of overtime. Say if he worked 50 hours, then we would have used .1 for the 18 hours.

Q Now, do you have any other copies of this particular sheet?

MR. EHRLICH: Excuse me, would you like a [9] copy?

MS. HENRY: Yes.

(Whereupon, there is a brief recess from the record.)

MS. HENRY: I would like to introduce this with the court reporter as Government Exhibit 4, the WH-134 form to which Mrs. Marburger was referring.

(Government Exhibit 4, Form WH-134 is received and marked for Identification.)

Q Did you understand those hours over 48 hours for which you were paying the mechanics to be a half time rate?

A Yes.

Q Which would be half time in addition to what the hourly salary was?

A Right.

Q At this time, I would like to go through these payroll records and ask you a couple of questions. And in that I am referring to the Government Exhibit 1.

What I am showing you now is a sheet labeled with the name Bruce Keefer, which is included in Exhibit 1 and the time payroll sheet starts at January 8, 1982.

Now was Bruce Keefer ever a mechanic for [10] Richland Shoe?

A Yes, he was.

Q Do you recall what time period he was a mechanic?

A No, because I believe he was a mechanic before I was there.

Q And was he a mechanic—

A I believe he was still on, but I am not sure at what point. He is still there, but he is back on the line.

Q He is no longer a mechanic in this case?

A Right.

Q Let me refer to Government Exhibit 2. I notice the copy that was given to the court reporter does not have Mr. Keefer's with it. I will copy it later and attach it so it is included. But it starts—this is the wage transcription sheet.

Did you prepare this?

A Yes.

(Said document copied and included after adjournment of deposition.)

Q At Mr. Marks' request?

A Right.

Q It goes up to the date of October 21, 1983?

A Yes.

[11] Q Does that—Excuse me, it doesn't.

A April 8, 1983. I'm sorry.

Q Does that refresh your recollection any?

A The reason I didn't remember or not is because I didn't start until August of '83. That is why I don't remember.

Q We understand why you don't remember.

Now, looking at Mr. Keefer's records for the week of September 16, 1983?

A Right.

Q There is a notation there that he worked 24 hours. Now at this point, his compensation is under piecework. Does that mean he is working as a piece worker?

A Right.

Q Would you explain for these records, when someone is recorded as working under piecework what that means?

A He is working on the line then and doing like in one of the departments. I don't know which department he worked in.

Q So from the time you were working there he was not a mechanic?

A Right.

Q But you prepared his computation based on [12] payroll records from when, before?

A Yes.

Q Were they payroll records that had been kept in the ordinary course of business for Richland Shoe?

A Yes.

Q Let's turn to Gerald Sechrist. Now, his starts also with January 8, 1983, his payroll records. We are now back on Government Exhibit 1.

A Okay.

Q Although I know you weren't working there at this time, I would still like you to—since you are familiar with these records, to try and explain them for me.

Let's take for example May 21, 1982; June 18, 1982; and July 30, 1982. Now, in all three of those weeks that I mentioned he is recorded as having worked 50 hours a week?

A Yes.

Q Is that correct?

A Yes.

Q And also for all three weeks I mentioned he is recorded as having $6.71 in the overtime—

A Right.

Q —category?

A Yes.

[13] Q And $395 dollars under the day work category?

A Yes.

Q Would that $6.71 indicate the time he worked over 48 hours?

A Right.

Q So that was payment for the two hours that he worked over 48 hours?

A Right.

Q And it is also proof or intends to substantiate the half-time pay that they were given for hours over 48?

A Yes.

Q Now let's go to time closer to when you were there.

I am pointing to May 27, 1983, where he is listed as having worked 48.25 hours. And at that point his day work is listed under day-work pay. He is listed as having $415?

A Right.

Q Is that his—what is that?

A His hourly wage figured on the 52 hours. That I explained earlier.

Q And then down under December 22, 1983, he is also listed as working—listed as working 50 hours. The wage under day work is still $415.

[14] Would that indicate he is still on the same salary structure?

A Yes.

Q Now, under 5-27-83 for that extra quarter hour he is indicated as having been paid 83 cents in overtime. Is that right?

A Yes.

Q And under December 22, 1983, he is indicated as having been paid $7.05?

A Right.

Q Now, stop me if I am doing something wrong, but with the 83 cents—so there is 83 cents for a quarter hour of pay. If you take 83 cents for a quarter hour of pay and times that by eight, should you not get what two hours of pay would be? You should be getting that?

A Yes.

Q What is eight times 83 cents?

MS. HENRY: Mrs. Marburger has a calculator. She will figure it and tell you.

Q I have $6.64?

A Yes.

Q Yet under the December 22, 1983, he is given $7.05 for the extra two hours. Is there any way that you have to explain where you came up with the [15] different figures for that time?

A With 50 hours.

(Witness pointing.)

MS. HENRY: She is pointing to Government Exhibit 4.

A For the 50 hours it would have been $415 . . .

(Witness trails off.)

Q Did you consistently use this table, the WH-134 to figure out overtime?

A I did not. The girl who actually – Judy is the payroll clerk. I did not sit down with this each week and do that. I oversee the payroll.

But as far as actually sitting down and calculating it out, I did not.

Q Judy, did you give instructions to Judy?

A She was doing it when I started.

Q Do you know how she did it?

A She was using this schedule. But when I see this here, I am not positive what she was doing.

Q Does it appear to you with the variation figure, the $6.20 and the other figure, that the hourly rate seems to be in confusion, if indeed an hourly rate was being used?

MR. EHRLICH: If she knows.

Q Do you know?

[16] A I know an hourly rate was being used, but possibly there could have been a confusion on Judy's part.

Q Do you have any other explanation as to why those hours differ?

A No.

Q Now, we go to Ricky Brossman again. And I realize that this may have been before you were there, but I would like to point out July 23, 1982. We are back on Government Exhibit 1.

And it has 53 hours there and $15 under overtime pay?

A Yes.

Q Would that indicate that that $15 is for the hours he worked over 48 in that week?

A Yes.

Q Which would be $15 for five hours?

A Yes.

Q Which would be $3 per hour?

A Yes.

Q Again on August 20, 1982, there is a 48.50?

A Yes.

Q And then $1.87 next to that?

A Yes.

Q Which would indicate $1.87 for the extra half [17] hour over 48?

A Yes.

Q And, of course, if you times $1.87 times two it doesn't come out to $3?

A Right.

Q Do you know why that is?

A If I take $3.75 divided by the 52, it would have been $7.21. And divide that then by four to come up with your quarter hour. It would be $1.81.

Q So that does not compute with the $1.87?

A Right.

Q And again let's use a time when you were here. Let's go to – Well, we will try November 25, 1983, when he worked 50 hours and also the week before that of November 18, 1983. He worked 50 hours and $6.71 is listed under overtime pay.

Would that be the pay for the two hours he worked over 48?

A Yes.

Q And $395 is listed under day work. Would that be his base rate?

A Right. It would have been $7.60.

Q Would have been his hourly rate?

A Right.

Q Does that even out with the $6.71 for two [18] hours?

A No.

Q And now I would like to go to William Padillas, still on Government Exhibit 1. Again, I realize this is before your working here.

But on April 30 of 1982 he shows 49 hours?

A Yes.

Q And there is $2.65 under overtime?

A Yes.

Q Would that be for the hour above 48?
A Yes.
Q And $295 is his base rate?
A Right. It would have been $5.67.
Q So according to your calculations, the hourly rate excluding overtime rate would be $5.67?
A Yes.
Q Do you have Mr. Padillas' original records here?
A I don't know if I do or not.
Q Is Mr. Padillas still working for Richland Shoe?
A Yes.
Q The reason I am asking is because the Department of Labor only has up until 1982, and I was wondering if there were any records for 1983?
[19] A He was not always a mechanic. So maybe he wasn't during '83, so I didn't pull his records out.
Q I just wanted to explain why we don't have the 1983 records.
So you don't have the originals of his 1983 records with you?
A No, I do not.
Q Now we will go to James Hummel. Let me ask you about the people I previously asked you about.
Were these people employed at the times I have spoken to you about as mechanics?
A Yes.
Q James Hummel, was he employed as a mechanic at Richland Shoe?
A Yes.
Q Let me refer to his September 2, 1983, pay which shows 52 hours worked and $10.40 underneath overtime, which would be for the four hours above 48?
A Yes.
Q What does that come out to for an hourly rate?
A Well, $6.35 an hour.
Q And going then to December 22, 1983, for 53 hours

there is $13 listed under overtime. And what would that come out to for an hour?
[20] A For the overtime it would have been $2.60.
Q So are those two figures consistent in giving an hourly rate for overtime pay?
A No, but I know—all I know is she used to use this form. And I don't know what the formula is.
Q You don't know how to explain the inconsistencies?
A No.
Q And if I were to show you similar equations with Patrick Dostick, a mechanic for Richland Shoe—
A Yes.
Q —would you be able to explain any equations that might come out the same way on his file?
A No.
Q And for John Dostick and John Zserai also in Government Exhibit 1?
A What?
Q If I were to show you equations that would come out similarly, that is unevenly, if you took overtime weeks as we have done for the previous five mechanics in Mr. Zserai's file, would you have an explanation as to why they existed?
A No.
Q Let me show you what was marked as Government's Exhibit 3, which is entitled Breakdown,

• • • • •

[30] *PAUL ISENBERG*, having been duly sworn, was examined and testified as follows:

EXAMINATION BY MS. HENRY:

Q I ask you, could you give your name and business address?
A Paul Isenberg, Richland Shoe, Womelsdorf.
Q Do you work for Richland?

A Yes.
Q What is you position?
A General manager.
Q What are your duties as general manager?
A Oversee all phases of the manufacture and sales of Richland Shoe Company.
Q Do you have any personnel duties as general manager?
A Yes, I do.
Q What are your personnel duties?
A I hire supervisors.
Q How long have you held that position as general manager of Richland Shoes?
A Sixteen years.
Q Are you aware of the Labor Standards Act?
A Yes, that that act exists.
Q And that the Labor Standards Act applies to [31] your business?
A Yes.
Q And how long have you been aware that the fair Labor Standards Act applied to your business?
A Since I started.
Q So that would be 16 years?
A Yes.
Q So you do know, again I realize this is repetitious, that the minimum wage and overtime applies?
A Yes.
Q Did you ever have a written agreement with your employees who work as mechanics detailing your method of payment?
A No.
Q Why didn't you have a written agreement?
A Because the system was in effect before I started.
Q When you say "the system"?
A The method of payment to mechanics was already is existence.

Q And you never changed that method of payment?
A No.
Q Did you ever have occasion to hire mechanics after?
[32] A Yes.
Q When you hired a mechanic, what method of pay, did you use the same method of pay that was in effect before?
A Yes.
Q But you never gave them any written explanations?
A No.
Q Is there any reason why after you came on board you didn't introduce such writing?
A It just didn't occur.
Q It just didn't occur to you?
A Right.
Q For the hours that the mechanics were paid—strike that.
Are you familiar with the wage rate that mechanics were paid?
A Yes.
Q And for the hours over 48, what wage rate would they have been paid for those hours that were worked over 48?
A They were paid according to the coefficient table.
Q Would that be a half time of their regular pay?
[33] A Yes.
Q As far as you know—I will show you what has been marked as Government Exhibit 4. Is that the table that was used?
A Yes.
Q Did you ever have occasion to prepare any of the mechanics' pay yourself?
A No.
Q Did you ever give instructions to anyone on what the wage rate was to be paid for the mechanics?
A Yes.

Q And to whom did you give those instructions?

A To the payroll clerk who was in charge of paying that person.

Q And who would that have been?

A Judy King. Here name is now Paff; she married.

Q What instructions would you give her?

A I would tell her what the rate of pay would be on their salary. We consider them salary.

Q Would that be rate of pay for 48 hours?

A Yes.

Q When you hired someone, did you tell them how much they would be paid a week?

A I would explain exactly how the thing was to [34] be paid.

Q And when you told Judy, you said you gave her the salary rate of pay?

A She had been using this for many years. And when I named a figure, she would know how to handle it.

Q Was she working there before you got there?

A Yes.

Q Could you give me an example of the kind of figure you would give her when you were telling her someone's pay when you would hire them?

A It would be so much in dollars. Say $350 or something of that nature.

Q Did you ever have occasion to pay bonuses to people who worked?

A Yes.

Q What was that bonus pay based on?

A We would pay bonus every year at Christmas time. We would give them an extra week's pay if they have been there for a year or more.

Q Did you ever have any kind of—

A We have another bonus that we pay on the number of machine parts that were bought over a three month

period. We average it out and, if it is below a certain figure per pair of production, we would pay another bonus. [35]

Q And were the mechanics paid for holidays?

A Yes.

Q What holidays were they given pay for, do you know?

A Well, if a holiday occurred during a given week, they were paid their salary which included the holiday even though they didn't work that day. If on July 4, they were given an extra day for the week they were off.

Q Let me show you an exhibit that has already been marked and it is Government Exhibit 3. Do you recognize that exhibit?

A Yes.

Q What is it?

A This is, from what I see, it is the number of hours that the mechanics worked and the number of weeks they worked in a certain amount of hours.

Q Did you request anyone to prepare this document, do you recall?

A I don't remember whether I requested or whether it was requested of us to prepare it.

Q To the best of your recollection, is this an accurate representation?

A Yes.

Q Other than knowing that the payroll clerk [36] referred to that particular sheet when she was preparing the payroll for these mechanics, do you know anything else about any kind of rates that were being paid to the mechanics? Let me rephrase that.

Would you be able to explain any discrepancies in pay to mechanics?

A Would I?

Q Yes.

A I don't know what you mean.

Q Let's go to Gerald Sechrist. Does Mr. Sechrist work as a mechanic for Richland Shoe?

A Yes.

Q And these are exhibits that have been marked as Government Exhibit 1.

If we take Mr. Sechrist's pay for May 27, 1983, it shows under pay work $415. Would that be his salary up to and including the 48 hours?

A Yes.

Q And for that date shown, it shows he works 48 and 1/4 hours and he is paid 83 cents under overtime. Would that overtime pay be for the quarter hour he worked over 48?

A That is right.

Q Now, for December 22, 1983, he worked 50 hours and he is marked as having been paid $7.05.

[37] Now, calculations that were done earlier show, if you make the 83 cents into an hourly rate, it comes out to $6.64, which is different than what you would get with the $7.

Do you have anyway of explaining that, or do you know why these kinds of discrepancies exist?

A No.

Q Was it true during the time period for which we are speaking the February 1982-February 1984 time period, that Gerald Sechrist was out on disability for some period of time?

A Yes.

Q Would you say that 14 weeks sounds about right for about how long he was out?

A I don't know.

Q Do you have anyway of remembering that?

A I know it was two or three months, but I don't remember exactly.

Q Could you explain what you consider to be a variance of hours worked for a mechanic? That is what

you would consider it to be, a wide variance of hours in a week for a mechanic to work?

A I don't understand the question.

Q In order to say that a mechanic had worked widely varying hours, what would you estimate the range * * *.

EMPL

9237

JAMES HUMMEL | [illegible] | [illegible]

ADDRESS [illegible] 1397 MEADOW BROOK DR

CITY, ZIP [illegible] LEBANON, PA. 17042

DATE	EARNINGS										
	REGULAR	PIECE WORK	OVERTIME	DAY WORK	MAKE-UP	BONUS	OTHER	CD	GROSS	FEDERAL	F.
113682	2880		1933	8580					10413	494	
120382	4530		2842	19330					22180	2531	
121782	3875		1643	16449	**/				18132	1877	

**/

These payroll records are enlargements of pertinent portions of Government Exhibit 1 to the Warburton and Saunders depositions. The full payroll records are reprinted, as Government Exhibit 1, at C.A. App. 744-1014.

JAMES HUMMEL | [illegible] | 9284

ADDRESS [illegible] 1397 MEADOW BROOK DR

CITY, ZIP [illegible] LEBANON, PA

DATE	EARNINGS										
	REGULAR	PIECE WORK	OVERTIME	DAY WORK	MAKE-UP	BONUS	OTHER	CD	GROSS	FEDERAL	F.
10684	3573			27884			3416	1	32588		
11384	4173		487	27884			3416	1	32987		
12084	3623		417	32588					33117		
12784	4950		422	32588					32922		
20384	4988		292	32588					32792		
21084	3273		1234	32588					33734		
21784	5188		938	32588					33438		

Burroughs, p.78

9204

JAMES HUMMEL | T35 FT 0464 | 9237

1197 MEADOW BRIDGE DR
LEBANON, PA. 17042

DATE	EARNINGS								
11183	600			3400					3400
	C- .34 CD. TAX YTD								
	C-CHNGE EMP. NO.								
62683	3450		1425	32500					34125
71583	4775			32500					32500
71583	3175			32500					32500
72283	4525			32500					32500
72983	3425		1568	32500					34068
80583	3425		1568	32500					34068
81283	3175		1442	32500					33942
81983	3475		1498	32500					34198
82683	3175		1087	32500					33587
90283	3200		1848	32500					33548
90983	4800			32500					32500
91683	4200		352	27884			5414 1		33852
92283	3425		1982	32500		10688			44482
93083	3125		877	32500					33377
	C- STARTED INS 3.45								
100783	3175		1087	32500					33587
101483	3475		1498	32500		10688			44198
102683	3150		1397	32500					33697
103483	3150		962	32500					33462
111183	3275		1235	32500					33735
111883	3125		877	32500					33377
112583	3250		1170	32500					33670
120283	4450		422	27884			5414 1		32922
120983	4350		942	27884			5414 1		33442
121683	3475		1498	32500		4688			40198
101483	3400		1527	32500					34827
122283	3300		1300	32500					33800
122283						32500			32500
123083	3750			27884		4688	5414 1		38588

Copy #1

WILLIAM PADILLAS | T35 FT 6922 | 9375

371 N. 12TH ST.
LEBANON, PA. 17042

DATE	EARNINGS								
10682	4150			23438		2342	4488 1		30442
11382	4350		233	28188		2818			31641
12282	3725			28188					28188
12782	4375			28188					28188
20582	4388			28188		2818			30918
21282	4375			28188		2818			30918
	C- CHNGE DEPNTS.								
21982	4525			28188		2818			30918
22682	4350			28188		2818			30918
30382	4188			28188					28188
31282	4425			28188					28188
31982	4650		141	28188		2818			31851
32682	4375			28188		2818			30918
40282	4888			28188					28188
40882	4888			28188					28188
	C- STOP VAC. CLUB								
41682	3888			24588			4920 1		29588
42382	4788			29588		9938			39438
43082	4988		265	29588					29765
50782	4388			29588		1778			31278
51482	4475			29588		2938			32438
52182	4425			29588		12938			41438
52882	4738			29588					29588
60582	4525		442	29588					29742
61282	4488			29588		2438	4920 1		31538
61882	4488			29588		2938			32438
62082							34562 2		34562
62082							34562 2		34562
62082							34562 2		34562
62582	4588			29588		6888			35588
70282	4788			29588		2938			32438
71482	4138			29588			4912 1		34412
72182	4888			29588					29588
72882	4988		265	29588					29765
80482	4888			29588					29588
81182	4138			29588					29588
82082	4775			29588					29588
82782	4488			29588					29588
90182	4725			29588					29588

WILLIAM PADILLAS

372 N. 12TH ST.
LEBANON, PA. 17042

C- START VAC. CLUB

ICKY BROSSMAN

N. SHERIDAN RD.
NEWMANSTOWN, PA.

C- STOP VAC. CLUB

C- START X-MAS CLUB

RICKY BROSSMAN — 787 Ct 305 — 290723 — 1171144

ADDRESS: N. SHERIDAN RD.
CITY, ST: NEWMANSTOWN, PA.

DATE	EARNINGS								
10383 4375			37500						37500
11483 4500			37500						37500
11783 4500			31252				6248	1	37500
12483 4375			37500						37500
120583 4750			37500						37500
120683 3925			37500						37500
C- STOP X-MAS CLUB									
121583 5650		787	37500		1500				39287
C- START VAC. CLUB									
122283 5675		862	37500						38362
122983 6600		4275	37500		3500				44725
123583 6100		3337	37500		3000				43837
123283 5675		1938	37500						39438
111983 5925		712	37500						38212
112683 6200		3525	37500						41025
120383 6100		3750	31252				6248	1	41250
121083 5350		5987	31252				6248	1	43487
121783 5900		2925	37500						40425
122483 5650		2250	37500		9000				48750
122487					35100				35100
123183 4650		576	29600				15624	1	45498

Surrogate, etc.

RICKY BROSSMAN — 787 Ct 305 —

ADDRESS: N. SHERIDAN RD.
CITY, ST: NEWMANSTOWN, PA.

DATE	EARNINGS								
10783 4500		450	37500				6248	1	44198
11483 4450			37500						37500
11783 4950		487	37500						37987
12083 4900		537	37500		10000				47837
10483 300			37500						37500
11383 5825		712	37500						38212
11683 4225			37500						37500
12583 4875		242	37500		7000				44742
10483 5100		1499	37500						38999
11183 4925		412	37500		6000				43912
11883 4950		487	37500						37987
C- NO VAC. CLUB									
12583 4875		242	37500						37742
13183 4800			37500						37500
10883 3725			31252				6248	1	37500
11583 5325		1412	37500						41119
C- START X-MAS CLUB									
12283 4775			37500						37500
12983 5825		738	37500						40250
10483 5475		2547	37500						42967
11383 5100		987	37500		10000				38487
12083 4950		513	37500						40813
12783 4725			37500						37500
10383 5350		1478	37500						41178
11083 4825		2489	32914				6584	1	41989
11783 5975		1239	37500		10000				32739
11783 5975-	-	1239-	37500-	-	10000-				32739-
11783					10000				10000
12083							44078	2	44078
12083							44078	2	44078
11783					10000				10000
11783 -	-	-	-	-	10000-				10000-
102883 5350		1478	37500						41178
110483 5400		1834	37500						41334
111183 4925		434	37500						37934
111883 5600		671	37500						40171
112583 5600		671	37500						40171
120283 1650			32914				6584	1	39500
120983 4325		1066	32914				6584	1	40566

Surrogate, etc.

RICKY BROSSMAN

N. SHERIDAN RD.
NEWHANSTOWN, PA

DATE	EARNINGS									
	REG.HRS.	PIECE WORK	OVERTIME	DAY WORK	MAKE-UP	BONUS	OTHER	CD	GROSS	FED
12/31/83	35.25			329.16			65.84	1	395.00	
1/1/84	40.00			329.16			65.84	1	395.00	
1/2/84	47.75			395.00					395.00	
1/3/84	51.75		12.24	395.00					407.24	
1/4/84	48.00	395.00							395.00	
1/5/84	53.00		15.79	395.00					410.79	
1/7/84	58.50		9.58	395.00					404.58	

RICKY BROSSMAN

N. SHERIDAN RD.
NEWHANSTOWN, PA

DATE	EARNINGS									
	REG.HRS.	PIECE WORK	OVERTIME	DAY WORK	MAKE-UP	BONUS	OTHER	CD	GROSS	FED
1/8/84	35.25			329.16			65.84	1	395.00	
1/9/84	40.00			329.16			65.84	1	395.00	
1/10/84	47.75			395.00					395.00	
1/11/84	51.75		12.24	395.00					407.24	
1/12/84	48.00	395.00							395.00	
1/13/84	53.00		15.79	395.00					410.79	
1/14/84	58.50		9.58	395.00					404.58	

NAME GERALD SECHRIST | SOC. SEC. NO. 201 28 7681 | EMP. NO. 9285 | SALARY | RATE

ADDRESS | CITY, ZIP | R.D. #4 MYERSTOWN, PA. 1706 | 284268 | 126244

DATE	EARNINGS: REGULAR	PIECE WORK	OVERTIME	DAY WORK	MAKE-UP	BONUS	OTHER	CD	GROSS
9 0 82	4400			39500					39500
9 1 82	4500			39500					39500
9 1 82							6584	1	39500
9 1 82	3900			32916					40892
9 7 82	4875		592	39500					39697
10 0 82	4850		197	39500					39500
10 0 82	4800			39500					41171
10 1 82	5000		671	39500	1000				40813
10 2 82	4950		313	39500					44198
10 2 82	5150		1698	39500	3000				43487
10 8 82	5100		987	39500	3000				41398
11 1 82	3450		2448	32916					41837
11 1 82	5100		937	39500					42225
11 2 82	3750		2725	39500					39500
12 0 82	4750			32916			6584	1	46182
12 1 82	5325		6682	32916			6584	1	44674
12 1 82	7000		5174	39500					51541
12 2 82	5875		3041	39500	9000				37500
12 2 82					37500				47838
12 3 82	4250		954	32916			13168	1	

Sept #1

NAME GERALD SECHRIST | SOC. SEC. NO. 201 28 7681 | EMP. NO. 9285 | SALARY | RATE

ADDRESS | CITY, ZIP | R.D. #4 MYERSTOWN, PA. 1706

DATE	EARNINGS: REGULAR	PIECE WORK	OVERTIME	DAY WORK	MAKE-UP	BONUS	OTHER	CD	GROSS
8 0 8 2	3900			31884		3188	6216	1	48488
8 1 1 8 2	4750			37500		3750			41830
8 1 2 8 2	4800			37500		3750			41830
8 2 0 8 2	4800			37500		2411			39911
8 2 8 8 2	4800			37500		3750			41830
8 2 1 8 2	4800			37500		3750			41830
8 2 1 8 2	4800			37500		3750			41830
8 2 2 8 2	4700			37500		3750			41838
8 3 0 8 2	4800			37500					37500
8 3 1 8 2	4800			37500					37500
8 3 1 8 2	4925		418	37500					37710
9 2 0 8 2	4800			37500		3750			41830
9 2 8 8 2	4800			37500					37500
9 3 0 8 2	4800			37500		2238			39538
9 3 1 8 2	3850			32916			6584	1	39500
9 4 2 8 2	4775			39500		7000			46500
9 4 8 8 2	5150		1143	39500		3950			44595
9 5 0 8 2	4950		313	39500					40813
9 5 1 8 2	5200		1264	39500		1975			42739
9 5 2 8 2	5000		671	39500		11140			53131
9 5 2 8 2	5200		1264	39500		3950			44714
9 6 0 8 2	4800			39500					39500
9 6 1 8 2	3950			32916			6584	1	39500
9 6 1 8 2	5000		671	39500		3950			44121
9 6 3 8 2							46569	2	46569
9 6 3 8 2							46569	2	46569
9 6 3 8 2							~~46569~~	~~2~~	~~46569~~

C- CORRECT YTD TOTALS - CK. FOR 165.69 VOIDED

9 6 3 8 2							46569	2	46569
9 6 3 8 2							46569	2	46569
6 2 5 8 2	4800			39500		4000			43500
7 0 2 8 2	4800			39500					39500
7 1 6 8 2	4400			39500			6584	1	46084
7 2 1 8 2	4800			39500					39500
7 3 0 8 2	5000		671	39500					40171
8 0 6 8 2	4950		313	39500					40813
8 1 3 8 2	4800			39500					39500
8 2 0 8 2	4800			39500					39500
8 2 7 8 2	4800			39500					39500

Cont'd

"GERALD SECHRIST | "ZIP" 28 7468 | "ZIP" 9705 | SALARY | DATE

ADDRESS R.D. [illegible]

CITY, ZIP 16 MYERSTOWN, PA. 1706

DATE	REG. HRS	PIECE WORK	OVERTIME	DAY WORK	MAKE-UP	BONUS	OTHER	CD	GROSS
10783	4125-		592	39500			6584	1	46674
11483	4930-		513	39500					40813
11783	4850-		197	39500					39697
12083	5200-		1243	39500		10000			50743
12483	4925-		434	39500					39934
	C- CHANGE ADDRESS - R.D. #2								
21183	4800-			39500					39500
21883	5050-		829	39500					40329
22583	4825-		379	39500		7000			46379
10483	4850-		197	39500					39697
11183	4800-			39500		4000			43500
11883	4800-			39500					39500
12583	4800-			39500					39500
13183	4800-			39500					39500
[illegible]	[illegible]			[illegible]			6584	1	[illegible]
[illegible]	[illegible]			[illegible]					[illegible]
42283	4775			41500					41500
42983	4525			41500					41500
50483	5350		1784	41500					43284
51383	5450		2075	41500		10000			53575
52083	4825		82	41500					41582
52783	4825		83	41500					41583
60383	4800			41500					41500
61083	4000			34500			6920	1	41500
61783	2425			41500		10000			51500
62083	[illegible]			[illegible]			47369	2	47369
63083							47369	2	47369
63083							47369	2	47369
63083							47369	2	47369
62483				41500					41500
63083	4800			41500					41500
71583	4800			41500			6920	1	48420
72283	4800			41500					41500
72983	4800			41500					41500
80583	4800			41500					41500
81283	4800			41500		10000			51500
81983	4800			41500					41500
82683	4800			41500		10000			51500
90283	4800			41500					41500

Burroughs

"GERALD SECHRIST | "ZIP" 28 7468 | "ZIP" 9705 | SALARY | DATE

ADDRESS R D #2

CITY, ZIP 16 MYERSTOWN PA

DATE	REG. HRS	PIECE WORK	OVERTIME	DAY WORK	MAKE-UP	BONUS	OTHER	CD	GROSS
90983	4800			41500					41500
91683	4800			41500					41500
92383	4800			41500					41500
93083	4800			41500					41500
100783	4800			41500					41500
101483	4800			41500		10000			51500
102183	4800			41500					41500
102883	4800			41500					41500
110483	3800			41500					41500
111183	4800			41500					41500
111883	3150		1283	41500					42783
112583	4400		1838	41500					43338
112583	4400-	-	1838-	41500-	-	-			43338-
112583	4400			41500					41500
120283	3700			34500			6920	1	41500
120983	4100		373	34500			6912	1	418 [illegible]
121683	4800			41500		6000			47500
101483	4800			41500					41500
122283	5000		785	41500					42285
122283						41500			41500
123083	3500			34500		6000	6912	1	47500

Burroughs

EMPLOYEE EARNINGS RECO

GERALD BECHRIST

R.D. 2
MYERSTOWN, PA

DATE	REGULAR	PIECE WORK	OVERTIME	DAY WORK	MAKE-UP	BONUS	OTHER	CD	GROSS	F
10684	3450			34500				1	34500	
11384	3935			34500					34500	
12084	4080			41500					41500	
12784	5175		1284	41500					42784	
20384	4650		32	41500					41532	
21084	4725			41500					41500	
21784	4980		339	41500					41839	

Surroughs

EMPLOYEE EARNINGS REC

PATRICK BOSTICK

BOX 6129 A R.D. 82
JOHNSTOWN, PA.

DATE	REGULAR	PIECE WORK	OVERTIME	DAY WORK	MAKE-UP	BONUS	OTHER	CD	GROSS	F
10682	3550			28432		2842	5468	1	36842	
11382	4980		187	34500		3418			37918	
12282	4650		171	34500		3418			37681	
12982	4800			34500					34500	
20582	4825		49	34500		3418			37579	
21282	4800			34500		3418			37518	
21982	4650			34500		3418			37518	
22682	4500			34500		3418			37518	
30582	4275			34500					34500	
31282	4325			34500					34500	
31982	4925		375	34500		3418			37885	
32682	4650		171	34500		3418			37681	
40282	4825		49	34500					34169	
40882	4825		49	34500					34169	
41682	3550			29632			5968	1	35600	
42382	4650		179	35600		10580			46559	
43082	4925		194	35600					36194	
50782	4825		72	35600		2148			38820	
51482	4825		72	35600		3580			39452	
52182	4825		72	35600		13580			49452	
52882	4875		251	35600					36851	
60582	4825		72	35600					36851	
61282	4825					2981	5968	1	39781	
61882	4800			35600		3580			39380	
62382							40564	2	40564	
62582	5800		489	35600		6800			42489	
70182	4425			35600		3580			39380	
71682	4125			35600			5968	1	41748	
72382	4725			35600					35600	
73082	4875		251	35600					36851	
80682	4575			35600					35600	
81382	4475			35600					35600	
82082	4350			35600					35600	
82782	4750			35600					35600	
90382	4600			35600					35600	
91082	4325			35600					35600	
91782	3850			29632			5968	1	35600	
92482	4650			35600					35600	
100182	4600			35600					35600	

Surroughs

PATRICK DOBTICK | [illegible] 8915 9289

BOX 4129 A R.D. #2
JONESTOWN, PA.

DATE	EARNINGS								
10	6/83	4475			35800				35800
10	7/83	4925		394	35800	1800			37594
10	8/83	5075		824	35800				36624
10	9/83	5625		681	35800	3000			39481
11	0/83	5625		681	35800	3000			39481
11	1/83	5100		895	35800				36695
11	2/83	5075			35800				35800
11	3/83	5525		1948	35800				37748
12	0/83	4400			29832		5968	1	35800
12	1/83	4900		4687	29832		5968	1	39487
12	2/83	5425		1719	35800				37519
12	3/83	5525		1969	35800	9000			46769
12	4/83					34108			34108
12	5/83	5650			29832		11936	1	41768

Burroughs

PATRICK DOBTICK | 188 12 8915 9289

BOX 4129 A R.D. #2
JONESTOWN, PA.

DATE	EARNINGS								
10	7/83	4150		644	35800		5968	1	42412
10	8/83	5650		732	35800				36532
10	9/83	4675		251	35800				36051
11	0/83	4675		251	35800	10000			46051
11	1/83	4675		251	35800				36051
11	2/83	4675		251	35800				36051
11	3/83	4225			35800				35800
11	4/83	4675			35800	7000			42800
11	5/83	4675			35800				35800
11	6/83	4925		394	35800	6000			42794
11	7/83	4825		72	35800				35872
11	8/83	4900		323	35800				36123
11	9/83	4675		251	35800				36051
12	0/83	3425			29832		5968	1	35800
12	1/83	4925		517	37500				37717
12	2/83	4950		437	37500				37937
12	3/83	4850		187	37500				37687
12	4/83	4850		787	37500	10000			48287
12	5/83	5150		1687	37500				38587
12	6/83	5000		637	37500				38137
12	7/83	5125		1012	37500				38512
12	8/83	4100		337	31252		6248	1	37837
12	9/83	5625		712	37500	10000			48212
13	0/83						40332	2	40332
13	1/83						40332	2	40332
13	2/83	5100		937	37500				38437
13	3/83	5625		712	37500				38212
13	4/83	4375			37500		6248	1	31748
13	5/83	4650			37500				37500
13	6/83	5500		1500	37500				39000
13	7/83	5075		842	37500				38342
13	8/83	5125		1275	37500	10000			48775
13	9/83	5125		1275	37500				38775
14	0/83	5050		787	37500	10000			48287
14	1/83	5200		1200	37500				38700
14	2/83	4825		75	37500				37575
14	3/83	4125		412	31252		6248	1	37912
14	4/83	5200		1200	37500	10000			48700

Burroughs

PATRICK DOBTICK

BOX 4129 R R.D. #2

JONESTOWN, PA.

DATE	EARNINGS										
12/83	3625			711	37500					38211	
12/83	3625			1012	37500					38512	
12/83	3625			1162	37500		10000			48462	
12/83	3200			1200	37500					38700	
12/83	3500			937	37500					38437	
12/83	3050			787	37500					38287	
12/83	3200			1200	37500					38700	
12/83	3400			1742	37500					39242	
12/83	4100			137	31252			6248	1	37637	
12/83	4150			487	31252			6248	1	37987	
12/83	3200			1200	37500		6500			44700	
12/83	325			1612	37500					38512	
12/83	3125			1612	37500					38512	
12/83							37500			37500	
12/83	3625				31252		6500	6248	1	43500	

PATRICK DOBTICK

BOX 4129 R R.D. 2

JONESTOWN, PA

DATE	EARNINGS										
12/84	3625			137	37500					37637	
12/84	4150			487	37500					37987	
12/84	3150			1087	37500					38587	
12/84	3125			1612	37500					39112	
12/84	3625			1162	37500					38662	
12/84	3125			1248	40000					41248	

"JOHN ZSERAI

R.D. 3 143 W. MAIN
LEBANON, PA. 17042

DATE	EARNINGS									
	REGULAR	FULL HOURS	OVERTIME	EXT HOURS	HOLIDAY	BONUS	OTHER	CD	GROSS	TX
11483	3800		447	27500					27947	
11583	4425			27500					27500	
12683	3650		327	27500					28827	
12483	4650		150	30000					30150	
11583	4650		150	30000					30150	
11683	4500			30000					30000	
12583	4875		210	30000					30210	
10483	4650		150	30000					30150	
11183	4500			30000		4500			34500	
11683	4875		210	30000					30210	
12583	4725			30000					30000	
11583	4875		210	30000					30210	
10683	3475			25000			5000	1	30000	
11583	3500			31500					31500	

C- STAART X-MAS CLUB
C- START INSURANCE

12283	4650		43	31500			31543
12983	4650		157	31500			31657
10683	4900		283	31500			31783
11583	4500			31500		10000	41500

Earnings, etc.

"JOHN ZSERAI

DATE	EARNINGS									
	REGULAR	FULL HOURS	OVERTIME	EXT HOURS	HOLIDAY	BONUS	OTHER	CD	GROSS	TX
12683	3327		1291	31500					32791	
12783	4400			31500					31500	
10383	4950		489	31500					31989	
11083	3950			26252			5248	1	31500	
11783	5300		1260	31500		10000			42760	
12483	5873		724	31500					32224	
10383	4650		157	31500					31657	
11583	4500			31500			5248	1	36748	
12283	5650		661	31500					32161	
12983	4925		344	31500					31844	
10583	4875		328	31500					31728	
11383	4725			31500		10000			41500	
11583	4750			31500					31500	
12483	4975		472	31500		10000			41972	
10283	5350		1334	31500					32834	
10983	4925		344	31500					31844	
11483	3925			26252			5248	1	31500	
12383	4925		344	31500		10000			41844	
11583	4900		283	31500					31783	
10873	4650		157	31500					31657	
10283	4725			31500		10000			41500	
10283	4725			31500					31500	
11583	4750			31500					31500	
11183	4800			31500					31500	
11383	4400			31500					31500	
11283	4725			31500					31500	
12083	3875			26252			5248	1	31500	
12983	1700			24937			6563	1	31500	
11483	4725			31500		6000			37500	
10183	4800			31500					31500	
12283	4750			31500					31500	
12283						31500			31500	
12383	3438			26252		6000	5248	1	37500	

Earnings, etc.

| NAME JOHN ZSERAI | | |

Cont'd 1

NAME BRUCE KEEFER — Tot 50 6512 — 9110 — SALARY — RATE

ADDRESS " " — R.D. #1 BOX 227 A

CITY, ZIP 18 — MYERSTOWN, PA. 17067

DATE	EARNINGS								
	REGULAR	PIECE WORK	OVERTIME	DAY WORK	MAKE-UP	BONUS	OTHER	CD	GROSS
10882	4100			23336		2336	4644	1	30336
11382	4825	3400	36	24520		2800			30856
12282	4350	6720		21300		2240			30260
12982	4400	6985		21895		2240			30260
20582	4400			28000		2800			30800
21282	4775	3142		24858		2800			30800
21982	4450	2897		25103		2800			30800
22682	4400	1170		26830		2800			30800
10582	4675			28000					28000
11282	4775			28000					28000
11982	4775			28000		2800			30800
12682	4400			28000		2240			30240
40282	4900	6434	252	21346		1600			29932
40882	4800	3797		24203					28000
41482	3425	1782		22738			4920	1	29500
42382	4450			29500		7000			36500
43082	5875		478	29500		2950			33128
50782	4800	1801		27699		1475			30975
51482	4900	1900	245	27600		1475			31240
52182	5100	5941	737	23559		12360			42597
52882	4450			29500		2340			31840
40482	4900	1159	245	28341					29745
41182	4400			24580			4920	1	29500
41882	4675			29500					29500
63082							31392	2	31392
63082							31392	2	31392
62582	4900	2334	245	27464		6080			35745
70282	900			29500					29500
C- CO. CODE TO BERKS									
71682	1350			8383			4920	1	13223
72382				21597					21597
72382	4400	17426		12074					29500
C- CORRECT LOCAL YTD TOTAL									
73082	5000	7419	501	22081					30081
80682	4775			29500					29500
81382	4850		147	29500					29647
82082	4300			29500					29500
82782	4800			29500					29500
90382	5100		737	29500					30237

Burroughs

9110

NAME BRUCE KEEFER — Tot 50 6512 — SALARY — RATE

ADDRESS " " — R.D. #1 BOX 227 A

CITY, ZIP 18 — MYERSTOWN, PA. 17067

DATE	EARNINGS								
	REGULAR	PIECE WORK	OVERTIME	DAY WORK	MAKE-UP	BONUS	OTHER	CD	GROSS
10783	3850			29500			4920	1	34420
C- CHANGE EMP. NO.									
11483	4275	21670	711	450					22831
12183	4800	19779		450					20229
12883	4100	19318	244	900		10000			30456
20483	4800	17679			321				18000
21183	4875	17483	225		935				18343
21883	3400	17475		170					17645
22583	4800	22318		85					22395
30483	4800	22066		85					22151
31183	4100	25189	385	466					25620
11883	3850	25921		466					25867
12583	3925	24992							24992
40883							4712	1	4712
41883							4712	1	4712
43083							25468	2	25468
43083							25468	2	25468
41983	3200	15483		89					15772
42683	4800	13661			4339				18000
50283	4800	14812			3188				18000
50983	4850	19961	50						20811
51683	2400	12298					3760	1	16058
102383	3875	17343		96					17439
102883	1400	7854		89					7943
110483	3200	12519		97	1784				14408
111183	3875	19502		597					20099

Burroughs

NAME BRUCE KEEFER | SOC. SEC. NO. 188-58-6512 | EMP. NO. 5178 | SALARY | RATE

ADDRESS ST. R.D. 1 BOX 229 A

CITY, ZIP CO. MYERSTOWN, PA

DATE	EARNINGS									
	REG. HRS.	PIECE WORK	OVERTIME	DAY WORK	MAKE-UP	BONUS	OTHER	CD	GROSS	FC
123083	3250	21286	179	494		1544	4512	1	28813	

NAME BRUCE KEEFER | SOC. SEC. NO. 188-58-6512 | EMP. NO. 5178 | SALARY | RATE

ADDRESS ST. R.D. #1 BOX 229 A

CITY, ZIP CO. MEERSTOWN, PA

DATE	EARNINGS									
	REG. HRS.	PIECE WORK	OVERTIME	DAY WORK	MAKE-UP	BONUS	OTHER	CD	GROSS	FC
111083	4100	23772	290				1030.07		24862	
112583	4100	22036	267				1027.50		22303	
120583	3725	28499	1436	380			4808	1	26223	
120983	3200	15496		2493			4808	1	22197	
121483	4125	24559	380	488		230.35 1300.74			25427	
101483	3925	18647							18647	
122283	4000	24485		871					25356	

Supreme Court of the United States

No. 86-1520

WILLIAM E. BROCK, SECRETARY OF LABOR,
PETITIONER

v.

RICHLAND SHOE COMPANY

ORDER ALLOWING CERTIORARI. Filed October 5, 1987.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted.

U.S. GOVERNMENT PRINTING OFFICE: 1987—202-017/60830

PETITIONER'S

BRIEF

Supreme Court, U.S.
FILED
NOV 19 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1520

In the Supreme Court of the United States

OCTOBER TERM, 1987

DENNIS E. WHITFIELD, DEPUTY SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

RICHLAND SHOE COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether the court of appeals erred in holding that a violation of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. (& Supp. III) 201 *et seq.*, is "willful" within the meaning of the applicable statute of limitations, 29 U.S.C. 255(a), only where the employer, in acting contrary to the statute, knew that, or showed reckless disregard for whether, its conduct was prohibited by the FLSA.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-1520

DENNIS E. WHITFIELD, DEPUTY SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

RICHLAND SHOE COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 799 F.2d 80. The opinion of the district court (Pet. App. 10a-17a) is reported at 623 F. Supp. 667.

JURISDICTION

The judgment of the court of appeals (Pet. App. 22a-23a) was entered on August 26, 1986. A petition for rehearing with suggestion for rehearing en banc was denied on October 23, 1986 (Pet. App.

24a). Justice Brennan extended the time within which to file a petition for a writ of certiorari to March 19, 1987. The petition was filed on that date and granted on October 5, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 6 of the Portal-to-Portal Act of 1947, as amended, 29 U.S.C. 255, provides, in relevant part:

> Any action * * * to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended * * *, the Walsh-Healey Act * * *, or the Bacon-Davis Act * * *—
>
> (a) * * * may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued.

STATEMENT

1. a. The Fair Labor Standards Act of 1938 (FLSA or Act), 29 U.S.C. (& Supp. III) 201 *et seq.*, requires that covered employers adhere to certain standards in their compensation of covered employees. In particular, the Act requires, among other things, the payment of at least the prescribed minimum wage, currently $3.35 an hour (29 U.S.C. 206); the payment of one and one half times an employee's regular rate for overtime hours—generally, for hours in excess of 40 hours per week (29 U.S.C. (& Supp. III) 207); and the payment of equal wages

to men and women where required by the Equal Pay Act (29 U.S.C. 206(d)). The Act also requires covered employers to maintain, and to make available to the Department of Labor, certain wage and hour records (29 U.S.C. (& Supp. III) 211(c)).

The Act specifies two overlapping categories of covered employees. All employees who themselves are engaged in interstate commerce or the production of goods for such commerce are subject to the FLSA's wage and hour requirements. In addition, all employees of an "enterprise" that is engaged in interstate commerce or the production of goods for such commerce are covered by the FLSA. 29 U.S.C. 206(a), 207(a)(1); see *Tony & Susan Alamo Found.* v. *Secretary of Labor*, 471 U.S. 290, 295 n.8 (1985).[1]

Even when those coverage tests are met, an employer may nonetheless avoid some or all of the FLSA's requirements for some or all of its employees. The Act includes numerous partial or total exemptions, which Congress has frequently changed over the years, for particular industries or occupations. See 29 U.S.C. 213(a)(1)-(15) (exemptions from minimum wage, overtime, or Equal Pay Act requirements) and (b)(1)-(29) (exemptions from overtime requirements only).[2] Exemptions to the

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[1] A business is subject to "enterprise" coverage if it (i) meets the complex statutory definition of "enterprise" (29 U.S.C. 203(r)); (ii) has employees with certain connections to interstate commerce (29 U.S.C. 203(s)); and (iii) either has an "annual gross volume of sales made or business done" that is above certain specified amounts or is engaged in certain specified types of activity (*e.g.*, a laundry business, construction, education) (29 U.S.C. 203(s)).

[2] For example, neither the minimum wage nor overtime requirements of the Act generally apply to employees who

FLSA are construed narrowly, however, and employers bear the burden of proving entitlement to any claimed exemption. *Arnold* v. *Ben Kanowsky, Inc.*, 361 U.S. 388, 392, 394 n.11 (1960). See also *Citicorp Indus. Credit, Inc.* v. *Brock*, No. 86-88 (June 22, 1987), slip op. 8.

The FLSA provides three judicial remedies for violations of its pay provisions. First, the United States may bring a criminal prosecution against a person who willfully violates the Act's wage and hour requirements (29 U.S.C. 216(a)). Second, the Secretary of Labor may bring an injunctive suit seeking back pay and/or an injunction against future violations (29 U.S.C. 217). Third, either the Secretary of Labor or affected employees may bring a civil action to recover unlawfully withheld wages (29 U.S.C. 216(b) and (c)).[3] In this third type of action, regardless of who brings the suit, employees are entitled not only to the unlawfully withheld wages but also, presumptively, to an equal amount of liquidated damages (*ibid.*). If, however, the employer proves that the act or omission giving rise to its violation was in good faith and with reasonable grounds for believing that it was lawful under the FLSA, the trial court has discretion to reduce or

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work in "a bona fide executive, administrative, or professional capacity" or "in the capacity of outside salesman" (29 U.S.C. 213(a)(1)). The Equal Pay Act (29 U.S.C. 206(d)) remains applicable to employees who come within this exemption. See 29 U.S.C. 213(a).

[3] The right of employees to file suit on their own behalf terminates when the Secretary sues either to recover unpaid wages and liquidated damages or to enjoin future violations and to recover back pay. 29 U.S.C. 216(b) and (c).

eliminate the liquidated damages portion of the award (29 U.S.C. 260).

b. As enacted in 1938, the FLSA had no statute of limitations to govern injunctive or non-injunctive actions for unpaid minimum wages, overtime compensation, or liquidated damages. See 29 U.S.C. (1940 ed.) 201 *et seq.*[4] The courts accordingly applied state statutes of limitations to those FLSA actions. See, *e.g.*, *Donovan* v. *Shell Oil Co.*, 168 F.2d 229 (4th Cir. 1948); *Mid-Continent Petroleum Corp.* v. *Keen*, 157 F.2d 310 (8th Cir. 1946); *Loggins* v. *Steel Constr. Co.*, 129 F.2d 118 (5th Cir. 1942). In 1947, however, in Section 6(a) of the Portal-to-Portal Act, ch. 52, 61 Stat. 88, Congress enacted a uniform two-year statute of limitations for such FLSA actions.

This two-year limitations period remained in effect until 1966, when Congress extensively amended the FLSA. The amendments increased the minimum wage, tightened exemptions, and vastly expanded the Act's coverage: more than 7 million new workers and approximately 700,000 new establishments were made subject to the FLSA. Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, Tits. II & III, 80 Stat. 833-841.[5] The amendments also changed the

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[4] Criminal prosecutions under the FLSA have always been subject to the general federal criminal statute of limitations. See 18 U.S.C. 3282 (five years).

[5] See S. Rep. 1487, 89th Cong., 2d Sess. 2 (1966) (new workers); H.R. Rep. 1366, 89th Cong., 2d Sess. 18 (1966) (new workers); Wage and Hour and Public Contracts Divisions, U.S. Dep't of Labor, *Minimum Wage and Maximum Hours Standards under the Fair Labor Standards Act, Submitted to the Congress—1968*, at 27 (increase in number of employers).

statute of limitations to its present form, which requires that a cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages under the FLSA be brought within two years, "except that a cause of action arising out of a willful violation may be commenced within three years" (29 U.S.C. 255(a)).[6]

2. a. Respondent Richland Shoe Company, a manufacturer of foot-wear and other leather products, employed certain mechanics to repair and to maintain equipment in its plant. Though their hours fluctuated, the mechanics worked on average more than 40 hours a week (see Pet. App. 10a, 13a; J.A. 34-61). Nevertheless, contrary to the statutory requirement (29 U.S.C. 207(a)), respondent paid the mechanics a weekly salary on a "base week" of 48 hours, with a "half time" rate for hours in excess of that base week (Pet. App. 13a; see J.A. 34-61).

In 1984, the Secretary of Labor brought suit against respondent under 29 U.S.C. 217, seeking to enjoin future violations of the FLSA's recordkeeping and overtime provisions and to recover back wages for the affected mechanics (J.A. 4-7). Respondent alleged as an affirmative defense that the Secretary's

[6] This amended statute of limitations applies to causes of action under the Equal Pay Act, which is part of the FLSA (29 U.S.C. 206(d)(3)), and, by its own terms, to causes of action under the Walsh-Healey Act, 41 U.S.C. (& Supp. III) 35 *et seq.*, and the Davis-Bacon Act, 40 U.S.C. 276a *et seq.*, which impose certain labor conditions on certain government contractors. The limitations provision is made applicable to actions under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. (& Supp. III) 621 *et seq.*, by express language of that statute (29 U.S.C. 626(e)(1)). Throughout this brief, we refer to the limitations provision as the FLSA statute of limitations.

action was time-barred because it was not brought within two years of the alleged violations, as required by 29 U.S.C. 255(a) (J.A. 13). On the merits, respondent sought to excuse its noncompliance with the FLSA's overtime requirements by invoking the statutory exception for "Belo plans" (29 U.S.C. 207(f)). See *Walling* v. *A.H. Belo Corp.*, 316 U.S. 624 (1942). That exception permits employers to pay a weekly "salary" on a base week of up to 60 hours if certain conditions are met. Among other requirements, the duties of the employees covered by such a payment plan must "necessitate irregular hours of work" (29 U.S.C. 207(f)), and the fluctuation in hours must be both above *and below* 40 hours per week.[7] The Belo plan exception is narrowly drawn to provide the " 'security of a regular weekly income' " to employees who cannot, without some guarantee, know in advance whether they will receive pay for 40 hours of work in a week. *Donovan* v. *Brown Equip. & Serv. Tools, Inc.*, 666 F.2d 148, 153 (5th Cir. 1982) (quoting *Walling* v. *A.H. Belo Corp.*, 316 U.S. at 635).

[7] Under the Department of Labor's interpretive regulations (29 C.F.R. 778.406), "[n]onovertime hours as well as overtime hours must be irregular" for the Belo plan exception to apply. In addition, a valid "Belo plan" must be set forth in a bona fide individual employment contract or collective bargaining agreement, which must specify a regular rate of pay not less than the minimum wage for hours up to 40 per week, and payment at one and one half times that rate for guaranteed hours over 40 (29 U.S.C. 207(f)). For example, under respondent's purported plan, the guaranteed payments based on 48 hours a week (Pet. App. 13a; J.A. 18-20, 29) are supposed to reflect 40 hours at a regular rate and 8 hours at one and a half times that rate. Hours worked in excess of the 48-hour guarantee in this case must also be paid at one and a half times the regular rate, under 29 U.S.C. 207(a). See 29 C.F.R. 778.409.

The district court granted summary judgment to the Secretary. The court first agreed that respondent's compensation system was not a valid Belo plan because the mechanics' hours did not fluctuate significantly below 40 hours a week (Pet. App. 14a).[8] Having found an FLSA violation, the district court also agreed with the Secretary that respondent's violation was "willful" within the meaning of 29 U.S.C. 255(a), so that the mechanics were entitled to three rather than two years' back wages. The court reasoned that willfulness under Section 255(a) "requires nothing more than that the employer has an awareness of the possible application of the FLSA" (Pet. App. 15a), a standard drawn from *Coleman* v. *Jiffy June Farms, Inc.*, 458 F.2d 1139, 1142 (5th Cir. 1971) ("the employer knew or suspected that his actions might violate the FLSA. Stated most simply, we think the test should be: Did the employer know the FLSA was in the picture?"), cert. denied, 409 U.S. 948 (1972), and *Brennan* v. *Heard*, 491 F.2d 1, 3 (5th Cir. 1974) (emphasis in original) ("An employer acts willfully * * * if he knows, or has reason to know, that his conduct is *governed by* the [FLSA]."). In this case, the court found, willfulness was shown by the admission of respondent's general manager that he was aware that the FLSA governed overtime systems such as the one applied to respondent's mechanics (Pet. App. 15a-16a). Accordingly, the district court enjoined respondent from committing future violations and ordered back pay (*id.* at 16a, 19a-20a).

b. The court of appeals affirmed the district court's holding that respondent violated the FLSA, rejecting

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[8] The court found it unnecessary to reach the "other substantial grounds asserted" by the Secretary in support of his argument that the plan was invalid (Pet. App. 15a n.2). Respondent no longer contests the invalidity of its plan.

Not only did the mechanics' hours not fluctuate below 40 hours a week, but respondent's payroll records (J.A. 16-17, 34-61) show that the mechanics regularly worked more than the 48 hours a week for which they received a guaranteed weekly payment; yet not even for those excess hours were they paid one and a half times their regular rate. For example, beginning in 1983, Ricky Brossman was paid a base rate of $395 a week, which under respondent's payment plan came out to a regular rate of $7.60 per hour (J.A. 25, 41-42). Yet his overtime payments for two weeks when he worked 50 hours, which should have been $11.40 per hour (one and a half times the regular rate), instead totalled $6.71 for two hours, or twice the current minimum wage of $3.35 (*ibid.*). William Padillas, supposedly being paid a regular rate of $5.67 an hour, received $2.65 for one hour of overtime (J.A. 25-26, 37-38). James Hummel's compensation for four hours of overtime in one 52 hour work week, and five hours of overtime in another 53 hour work week, are calculated at $10.40 and $13.00, respectively, for an overtime rate of $2.60 an hour (J.A. 26-27, 34-36). See also J.A. 22-23, 44-48 (rate of overtime pay for Gerald Sechrist varied though regular rate of pay remained the same); see generally J.A. 34-61 (respondent's payroll records).

Neither respondent's office manager-accountant, who prepared the payrolls (J.A. 16), nor its general manager of 16 years, who oversaw all phases of manufacture and sales for respondent (J.A. 28), could explain the payroll discrepancies (J.A. 27, 32). According to the general manager, the method of payment had been in effect before he began working for respondent, and "[i]t just didn't occur" to him to explain in writing to the mechanics how the payment system operated (J.A. 29). Instead, he relied on an oral explanation at the time a mechanic was hired, and then gave a "salary rate" for the mechanic to a payroll clerk who "would know how to handle it" (J.A. 30). The general manager was aware for all of his 16 years in that position that the FLSA exists and that its minimum wage and overtime provisions apply to respondent's business (J.A. 28).

as "totally without merit" respondent's contentions that its plan met the requirements for a Belo plan and that the injunctive relief was inequitable (Pet. App. 3a n.2). Nevertheless, the court of appeals vacated the district court's award of back pay, ruling that the district court had applied an incorrect standard of willfulness under 29 U.S.C. 255(a).

The court of appeals first concluded that the standard applied by the district court was "wrong because it is contrary to the plain meaning of the FLSA" (Pet. App. 5a). The court stated that it was "clear that willfulness is akin to intentionality" and that the standard, therefore, at a minimum "requires reckless disregard" of consequences (*ibid.*). That "plain meaning," the court found, was not contradicted by any legislative history of which the court was aware (*id.* at 6a, 8a-9a). Moreover, the court reasoned, the standard used by the district court would make virtually all violations willful and thus would circumvent the two-tier scheme of liability that Congress intended (*id.* at 6a).

The court of appeals also relied on this Court's recent decision in *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111, 125-128 (1985). The Court there construed 29 U.S.C. 626(b), which restricts the award of liquidated damages under the Age Discrimination in Employment Act (ADEA) to cases of "willful violation[]." The Court held that the provision requires a knowing violation of, or reckless disregard for, the requirements of the ADEA. The court of appeals characterized *Thurston* as involving "a context very similar to the one at issue here" (Pet. App. 7a). It also noted that, while other courts of appeals had adopted standards for Section 255(a) more encompassing than the *Thurston* standard (Pet. App. 4a n.4) and at least one circuit had expressly found *Thurston* inapplicable,[9] the Seventh Circuit had adopted the *Thurston* standard for Section 255(a) in *Walton* v. *United Consumers Club, Inc.*, 786 F.2d 303 (1986). See Pet. App. 4a n.4, 6a, 7a-8a. The court of appeals followed *Walton* and concluded that the three-year limitations period for an FLSA "willful violation" applies only if the employer "knew or showed reckless disregard for the matter of whether its conduct was prohibited by the FLSA" (Pet. App. 8a (emphasis omitted)).

SUMMARY OF ARGUMENT

The terms "willful" and "willful violation" have a broad range of meanings, denoting anything from a conscious act taken in complete ignorance of the law to an act taken with bad purpose or a specific intent to violate the law. As the Court's decision in *Thurston* illustrates, the precise significance to be attached to those words must depend in part on the manner and context in which they are used. The court of appeals erred when it concluded that "willful" has a "plain meaning" that, whatever the context, requires at least a reckless disregard of the law.

This Court in *Thurston* (469 U.S. at 126) found a "reckless disregard" standard for willfulness accept-

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[9] The First Circuit in *Secretary of Labor* v. *Daylight Dairy Products, Inc.*, 779 F.2d 784 (1985), refused to extend *Thurston* to the FLSA statute of limitations, reasoning that the double damages provision construed in *Thurston* is punitive, while the FLSA statute of limitations is not. The court of appeals in this case rejected the First Circuit's analysis on the ground that increasing an employer's risk of liability for a "willful" violation "cannot be explained as anything else but a punitive measure" (Pet. App. 8a).

able in the ADEA liquidated damages context, relying chiefly on the punitive purpose of liquidated damages under the ADEA. Unlike its use in the ADEA liquidated damages provision, the use of "willful violation" in the FLSA limitations provision does not set a prerequisite for a punitive sanction. It instead defines the statute of limitations for *any* relief under the FLSA, and what is at stake here is simply whether employees who were unlawfully underpaid for three years may recover the full three years of back pay or, instead, only two-thirds of that amount. Moreover, the legislative history of the limitations provision contains no suggestion that the "willful violation" standard was intended to punish employers.

That history suggests, rather, that the standard was designed to provide employers with some protection from liabilities that they reasonably failed to anticipate, while allowing employees and the Department of Labor needed additional time to challenge unlawful pay practices. More specifically, the limitations provision should be construed to require that employers, rather than their employees, bear the risk that questionable pay practices may turn out to violate the FLSA. This allocation of risk is also supported by the post-enactment judicial and legislative history of the provision, by other provisions of the FLSA, and by the general rule that FLSA provisions should be interpreted to protect, rather than restrict, employees' rights. For those reasons, "knowing or reckless disregard" sets too high a standard for allowing employees to recover a third year of back pay.

We also believe that the "in the picture" standard adopted by the district court (at our urging) sets too low a standard. Because so few employers today would be unaware that the FLSA is in the picture, such a standard threatens to collapse the two-tier

scheme envisioned by Congress into a one-tier scheme. Further, the "in the picture" standard goes beyond the policy of requiring employers to bear the risk of uncertain pay practices and might even discourage employers, once they are aware the FLSA is "in the picture," from seeking reliable advice about their legal obligations.

We think an employer's unlawful pay practices should be found willful for purposes of the FLSA limitations provision when the employer is aware of the potential application of the FLSA but pursues the pay practices without reliable assurances of their legality. Thus, the inquiry should focus initially on whether, in pursuing practices later found to violate the law, an employer was aware of an appreciable possibility that the law applied to its business. If such awareness is present, but the employer fails to take steps reasonably calculated to determine whether its practices comply with the law, its violations should be considered willful. If the employer does take steps to determine its legal responsibilities, then it may limit its liability by showing that it received reasonable advice that its practices complied with the law and that it relied in good faith on such advice. This standard effectuates Congress's intent to create two tiers of liability for FLSA violations, without shifting to employees the risk of error when an employer pursues practices of uncertain validity.

Under the standard we propose, the only conclusion possible on the present record is that respondent willfully violated the FLSA. There is no evidence in the record that respondent, who was concededly aware that the FLSA applied, ever attempted to determine the validity of its purported Belo plan. Even if such attempts had been made, moreover, we find it hard to

imagine how the plan could have been the product of good faith reliance on sound assurances of the plan's legality. The plan is contrary to well-established Department of Labor regulations and court decisions, and there are unexplained recordkeeping and wage violations that raise questions as to whether respondent was genuinely attempting even to follow the plan it asserted.[10]

ARGUMENT

I. THE COURT OF APPEALS ERRED IN HOLDING THAT A VIOLATION OF THE FAIR LABOR STANDARDS ACT IS "WILLFUL" UNDER THE FLSA LIMITATIONS PROVISION ONLY WHEN THE EMPLOYER KNOWINGLY OR RECKLESSLY DISREGARDS THE REQUIREMENTS OF THE ACT

The court of appeals insisted that, as a matter of plain meaning independent of statutory context, "[a]t the very least a willful act requires reckless disregard of the consequences" (Pet. App. 5a). Under that interpretation, an FLSA back pay recovery is limited to two years unless the employer knows that the law

[10] The Equal Employment Opportunity Commission is the federal agency responsible for enforcing the Equal Pay Act, 29 U.S.C. 206(d), and the ADEA, 29 U.S.C. (& Supp. III) 621 *et seq.*, to both of which the FLSA statute of limitations applies (*see* note 6, *supra*). The Commission, in its litigation, has consistently supported the *Jiffy June* "in the picture" standard as an appropriate construction of the statute of limitations. The Commission has now decided that the standard we propose, under which a violation is willful if the employer acts without a reasonable basis for believing its acts are lawful, appropriately balances employees' interest in having an extra year to claim unlawfully withheld wages and employers' interest in avoiding undue liability for inadvertent violations. The Commission agrees that the *Thurston* standard should not be transposed into the statute of limitations context.

prohibits its actions and decides to violate the law anyway, or the employer's actions show a "reckless disregard" for whether or not it is complying with the law (*id.* at 8a). In our view, that definition of "willful violation" is too restrictive and, if left uncorrected, would frustrate the purposes of the FLSA.

A. The Meaning Of "Willful Violation" Depends On The Statutory Context And Does Not Always Include A Requirement Of Knowing Or Reckless Disregard Of The Law

This Court has repeatedly recognized that "willful" is a word "of many meanings, its construction often being influenced by its context" (*Spies* v. *United States*, 317 U.S. 492, 497 (1943)). See *Screws* v. *United States*, 325 U.S. 91, 101 (1945) (opinion of Douglas, J.); *United States* v. *Murdock*, 290 U.S. 389, 394-395 (1933). Thus, in numerous cases construing "willful" or "willful violation," the Court has carefully examined the particular statutory scheme at issue to determine which meaning was appropriate within that scheme. See, *e.g.*, *United States* v. *Bishop*, 412 U.S. 346, 360-361 (1973); *Screws* v. *United States*, 325 U.S. at 101; *Spies* v. *United States*, 317 U.S. at 497-498; *Browder* v. *United States*, 312 U.S. 335 (1941); *United States* v. *Illinois Cent. R.R.*, 303 U.S. 239, 242-244 (1938); *United States* v. *Murdock*, 290 U.S. at 394-395. Accord *United States* v. *Perplies*, 165 F.2d 874, 876 (7th Cir. 1948) ("The context of the statute in which the word 'willful' is used is often most important."). In fact, in *Thurston* itself (469 U.S. at 125-128), the Court adopted the knowing or reckless disregard standard, not on the basis of a supposed plain meaning, but only after analyzing the purposes and context of the ADEA liquidated damages provision.

As the court of appeals noted (Pet. App. 5a), "willful" refers to an intentional state of mind, but the object of the intent—what exactly must be intended—varies greatly. Even in the criminal context, where the concept is most frequently employed, willfulness is given a wide range of meanings. In some criminal statutes, the term means "with evil purpose, criminal intent or the like" (*United States* v. *Illinois Cent. R.R.*, 303 U.S. at 242). In other criminal statutes, an intent to do evil is not required. See, *e.g*, *Fields* v. *United States*, 164 F.2d 97, 99-100 (D.C. Cir. 1947), cert. denied, 332 U.S. 851 (1948); *American Surety Co.* v. *Sullivan*, 7 F.2d 605, 606 (2d Cir. 1925) (L. Hand, J.). In a variety of criminal statutes, all that is required is that "the act was deliberate, voluntary and intentional as distinguished from one committed through inadvertence, accidentally or by ordinary negligence" (*Nabob Oil Co.* v. *United States*, 190 F.2d 478, 480 (10th Cir.), cert. denied, 342 U.S. 876 (1952) (footnote omitted)) or "that the person charged with the duty knows what he is doing. It does not mean that, in addition, he must suppose that he is breaking the law" (*American Surety Co.* v. *Sullivan*, 7 F.2d at 606). Indeed, under a predecessor statute to the FLSA, this Court has held that an employer may be convicted of "intentionally violat[ing]" a wage and hour law merely by intending to do what the law forbids, even though the employer is ignorant of the law's requirements (*Ellis* v. *United States*, 206 U.S. 246 (1907) (Holmes, J.)). See also *Murdock*, 290 U.S. at 394 (recognizing the "voluntary act" definition of "willful" as well as the "bad purpose" and "reckless disregard" definitions).

The meaning of "willful" and "willful violation" likewise varies in civil statutes. For example, under Section 15(b)(4)(D) of the Securities Exchange Act of 1934 (15 U.S.C. (& Supp. III) 78*o*(b)(4)(D)), for administrative sanctions to be imposed on brokers and dealers who have "willfully violated" certain securities laws, proof has been required only " 'that the broker-dealer acted intentionally in the sense that he was aware of what he was doing.' " *Arthur Lipper Corp.* v. *SEC*, 547 F.2d 171, 180 (2d Cir. 1976), cert. denied, 434 U.S. 1009 (1978) (Friendly, J.) (quoting 2 L. Loss, *Securities Regulation* 1309 (1961)). A similar meaning has been found under some state statutes that penalize an employer's willful failure to pay wages in a timely manner as required by law. *State ex rel. Nilsen* v. *Johnston*, 233 Or. 103, 108, 377 P.2d 331, 333 (1962) (quoting *Davis* v. *Morris*, 37 Cal. App. 2d 269, 274, 99 P.2d 345, 348 (1940)) ("the person knows what he is doing, intends to do what he is doing, and is a free agent")). In still other civil statutes whose purpose is to compensate employees for injury rather than to penalize, courts have sometimes found a willful violation when the employer is merely negligent in failing to become aware of the violation. *E.g.*, *Kennerly* v. *Shell Oil Co.*, 13 Ill. 2d 431, 439, 150 N.E.2d 134, 139 (1958) ("willful violation" of Illinois occupational safety statute found "when by the exercise of reasonable care the existence of such dangerous conditions [producing the injury] could have been discovered and become known to" the employer). And, as we note below (pages 31-32, *infra*), until this Court's decision in *Thurston*, the courts of appeals uniformly construed "willful violation" in the FLSA

statute of limitations to require something less than reckless disregard of the law.[11]

Neither the word "willful" nor the phrase "willful violation," it is apparent, has a single readily discernible meaning or is capable of being understood without inquiry into the particular statutory context in which the term is used. That inquiry must take account of the fact that the meaning of "willful violation" in a given statute will largely determine the allocation of risks between those whose conduct gives rise to the violation and the victims of the conduct. A statute that makes an individual liable for a "willful violation," depending on what meaning the legislature intended the phrase to have, may be assigning to that individual either a high risk of liability (if mere voluntariness is sufficient), a low risk (if, *e.g.*, deliberate flouting of known legal obligations is required), or some intermediate degree of risk (if, *e.g.*, intentional taking of risky action is the standard). The statute would simultaneously be assigning a complementary degree of risk to the victim of the conduct: the greater the protection of the violator, the greater the exposure of the victim. Accordingly, in determining the meaning of "willful violation" as used in 29 U.S.C. 255(a), it is important to consider the appropriate balance of risks to employers and employees under the statutory scheme of the FLSA.

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[11] See also *Black's Law Dictionary* 1434 (5th ed. 1979) and 94 C.J.S. *Willful* (1956), for various definitions of "willful."

B. "Willful Violation" In The FLSA Limitations Provision Should Be Construed To Protect Employers From Liabilities They Reasonably Failed to Anticipate, But Not To Shift To Employees The Risk An Employer Assumes In Pursuing Pay Practices of Uncertain Legality

In *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. at 125-130, which construed the ADEA provision that restricts liquidated damages to cases of "willful violations" (29 U.S.C. 626(b)), the Court adopted the "knowing or reckless disregard" standard as "an acceptable" and "reasonable" definition of willfulness (469 U.S. at 129, 126). That ruling rested primarily on the conclusion that Congress included liquidated damages in the ADEA as a substitute for a criminal enforcement provision and intended liquidated damages to serve a punitive goal (*id.* at 125-126). The Court also observed that the knowing or reckless disregard standard was consistent with the meaning of "willful" in other statutes (*id.* at 126-127)—all of which, in fact, involved criminal or civil penalties. After noting that several courts had adopted the *Jiffy June* "in the picture" standard for the FLSA limitations provision (469 U.S. at 127), the Court pointed out that, even if those decisions were correct (a question the Court left open), a statute of limitations is different from a liquidated damages provision (*id.* at 127-128). Finally, the Court reasoned that the "in the picture" standard "would result in an award of double damages in almost every case," which would be contrary to Congress's intent to create "a two-tiered liability scheme" (*id.* at 128).

The *Thurston* concept of knowing or reckless disregard is itself subject to various interpretations. The Seventh Circuit has construed *Thurston* to allow

a finding of a willful violation of the ADEA when the employer "reasonably should have known" of the ADEA's requirements. *Rengers* v. *WCLR Radio Station*, 825 F.2d 160, 166 (1987). Moreover, relatively lenient constructions are suggested by this Court's quotation in *Thurston* (469 U.S. at 127) from *United States* v. *Murdock*, 290 U.S. at 395 (referring to mere " 'careless disregard [for] whether or not one has the right so to act' ")), as well as the Court's reference to the "good faith and reasonable grounds" standard of 29 U.S.C. 260 (see 469 U.S. at 128 n.22).[12] On the other hand, sterner constructions that require higher levels of moral culpability, carelessness, or irresponsibility on the part of employers are suggested by the connotation of the term "reckless" as involving rash or wanton conduct, and by the temptation to read "reckless" as embodying a degree of culpability akin to that inherent in a knowing violation.[13]

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[12] In addition, the Court indicated (469 U.S. at 127 n.20) that its standard was comparable to the standard adopted in *F.X. Messina Constr. Corp.* v. *Occupational Safety & Health Review Comm'n*, 505 F.2d 701 (1st Cir. 1974). The court of appeals in that case, citing *Jiffy June* (which established the "in the picture" standard, see page 9, *supra*), required only "a conscious, intentional, deliberate, voluntary decision" to find a "willful violat[ion]" (505 F.2d at 702).

[13] See *Berndt* v. *Kaiser Aluminum & Chem. Sales, Inc.*, 789 F.2d 253, 260 (3d Cir. 1986) (reading *Thurston* to require more than inadvertence). See also *Dreyer* v. *Arco Chem. Co.*, 801 F.2d 651, 656-657 (3d Cir. 1986) (the "willful" standard under the ADEA liquidated damages provision, where employer action "consists of a decision directed at an individual" instead of the adoption of a policy, requires proof of some "outrageous" conduct), cert. denied, No. 86-1062 (Mar. 2, 1987). At least one district court, relying on *Dreyer* and the court of appeals' decision here, has held that willfulness may require proof of "outrageous" conduct to extend the FLSA statute of limitations to three years. *Treese* v. *Chevron Corp.*, 666 F. Supp. 76 (W.D. Pa. 1987).

The Eleventh Circuit has declined to follow the Third Circuit's restrictive *Dreyer* formulation. *Lindsey* v. *American Cast Iron Pipe Co.*, 810 F.2d 1094, 1099-1100 (1987). Other courts of appeals have varied in their approaches to the issue. See *Bethea* v. *Levi Strauss & Co.*, 827 F.2d 355, 359 (8th Cir. 1987); *Furr* v. *AT & T Technologies*, 824 F.2d 1537, 1546-1547 (10th Cir. 1987); *Dominic* v. *Consolidated Edison Co.*, 822 F.2d 1249, 1256-1257 (2d Cir. 1987); *Gilliam* v. *Armtex, Inc.*, 820 F.2d 1387, 1390 (4th Cir. 1987); *Gilchrist* v. *Jim Slemons Imports, Inc.*, 803 F.2d 1488, 1494 (9th Cir. 1986); *Powell* v. *Rockwell Int'l Corp.*, 788 F.2d 279, 286 (5th Cir. 1986). See also *Spanier* v. *Morrison's Mgmt. Services, Inc.*, 822 F.2d 975 (11th Cir. 1987) (noting confusion in courts of appeals over the meaning of "willful" in the ADEA context after *Thurston*).

If, as we assume arguendo, the *Thurston* definition of willfulness does not encompass all actions taken in the face of uncertain FLSA obligations,[14] it would be inappropriate to apply that standard in the context of the FLSA limitations provision. In accordance with this Court's approach in *Thurston*, an analysis of all the relevant factors—including the consequences of a willfulness determination, the non-punitive operation and purposes of the FLSA limitations provision, the post-enactment history of the provision, and

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[14] See *Whitfield* v. *City of Knoxville*, 756 F.2d 455, 463-464 (6th Cir. 1985) (employer does not act in "reckless disregard" of ADEA requirements when courts are split on whether a practice violates the law and the employer relies on an ultimately rejected court position).

the broader purposes of the FLSA and the standards for employer protection under other provisions of the FLSA—shows that, in this setting, the risk of error should be borne by the employer. Section 255(a) should be construed to protect employers against a third year of back wage payments only for liabilities they could not reasonably have anticipated, not to shift to employees the risk of error when an employer pursues pay practices of uncertain validity.

1. The consequences to employers and employees of a willfulness determination in this case are strikingly different from what they were in *Thurston*. Under the provision construed in *Thurston*, a finding of willfulness triggers the payment to employees of punitive liquidated damages (in addition to the wrongfully withheld wages the employees receive whether or not the violation was willful). Only this punitive award is governed by the willfulness provision at issue in *Thurston*. Under the FLSA limitations provision, the stakes are not thus limited to the assessment of penalties.

In every case to which the FLSA statute of limitations provision applies, the standard of willfulness determines the amount of purely compensatory relief an employee may receive. (In some cases—although not in this one—it also determines the amount of liquidated damages.)[15] If a violation ceased more than

[15] This case was brought under 29 U.S.C. 217, and hence only back pay is at issue. Liquidated damages are available in some FLSA suits brought under 29 U.S.C. 216(b) and (c), and in ADEA suits where the *Thurston* standard is met. In such cases, the standard of willfulness under Section 255(a) would affect the amount of such damages as well as the amount of back wages.

That fact, however, furnishes no reason to adopt a more restrictive definition of willfulness under Section 255(a). First, among the cases for which the appropriate Section 255(a) standard must be determined are those, like this one, where the only monetary award at stake is the recovery of unlawfully withheld wages. The limitations period also affects the amount of back pay in cases where liquidated damages may be available, and contrary to the Seventh Circuit's view in *Walton* v. *United Consumers Club, Inc.*, 786 F.2d 303, 310 (1986), employees should not receive less back pay simply because they may also receive another award designed to serve a different function.

Indeed, in the FLSA context, this Court long ago held that liquidated damages are intended to compensate employees for the delay in recovery of unlawfully withheld wages (*Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697, 715 (1945)) and for various "damages too obscure and difficult of proof for estimate other than by liquidated damages" (*Overnight Motor Transp. Co.* v. *Missel*, 316 U.S. 572, 583-584 (1942)). A restrictive standard under Section 255(a) would thus diminish a second form of compensatory relief. Moreover, in the ADEA context, liquidated damages serve to punish, as this Court held in *Thurston*, and are available only against employers who are deserving of punishment under the *Thurston* standard. A restrictive standard should not be adopted for Section 255(a) simply in order to reduce the amount of punitive damages charged to such employers.

We also note that, when Congress enacted the present version of Section 255(a) in 1966, liquidated damages could be sought only by employees. Congress did not give the Secretary the right to seek liquidated damages in actions under 29 U.S.C. 216 until 1974. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 26, 88 Stat. 73. In addition, the ADEA was not enacted until 1967.

two years, but less than three years, prior to suit, a finding of willfulness is needed to allow the suit to be

brought at all. If the violation continued into the two-year period, and the suit may therefore be brought, the standard of willfulness determines whether those employees who were unlawfully underpaid for three years may receive the full three years of compensatory back pay or whether, instead, they are limited in their recovery to the most recent two years of back pay. Accordingly, an employer whose conduct is found not to be willful does not, as in *Thurston*, merely avoid imposition of a penalty. Rather, the employer escapes its obligation to pay wages (*e.g.*, minimum wages, overtime compensation, equal pay for equal work) that it was legally obliged to pay its employees in the first place.

2. Whereas the ADEA liquidated damages provision was intended to be punitive, as this Court concluded in *Thurston*, no such conclusion can be drawn with respect to the third year of liability provided for in the FLSA statute of limitations. Contrary to the court of appeals' suggestion (Pet. App. 8a), there is nothing "essentially" or inherently punitive about providing for an extended statute of limitations. The mere fact of additional liability, especially where limited to an additional period of lost wages, as is the case here, by itself does not suggest a punitive intent. Nor does the "willful violation" clause of Section 255(a) play the punitive role in the structure of the FLSA that the liquidated damages provision plays in the ADEA. Indeed, the FLSA contains an expressly punitive provision—29 U.S.C. 216(a), which provides for criminal penalties. That is the proper FLSA parallel for the punitive ADEA liquidated damages provision, which, as this Court observed in *Thurston* (469 U.S. at 125), was included in the ADEA as a substitute for the FLSA criminal provision.

The legislative history of the "willful violation" standard in Section 255(a), though sparse, confirms that the standard was not intended to define two classes of employers according to whether or not they are deserving of punishment. As we have noted, the FLSA had a uniform, two-year limitations period prior to enactment of the extensive FLSA amendments in 1966.[16] The 1966 amendments "effected the most far-reaching changes in coverage and exemptions since the Act was adopted in 1938" (Bureau of National Affairs, *The New Wage and Hour Law* 39 (rev. ed. 1967)), bringing under the Act's coverage more than 7 million employees not previously covered (112 Cong. Rec. 21945-21946 (1966) (remarks of Rep. Farbstein), 22649 (remarks of Sen. Yarborough)) and providing for increases in the minimum wage. The present two-tier limitations scheme originated in the 89th Congress's consideration of the bills that became those amendments.

After making several proposals for changes in the FLSA during the 88th Congress, none of which would have amended the FLSA statute of limitations (see *Minimum Wage-Hour Legislation: Hearings On H.R. 9824 Before the Subcomm. on Labor of the House Comm. on Education and Labor*, 88th Cong., 2d Sess.

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[16] The two-year period was enacted as part of Congress's response to several holdings of this Court that, in Congress's view, had created "wholly unexpected liabilities, immense in amount and retroactive in operation" (Portal-to-Portal Act of 1947, § 1(a), 29 U.S.C. 251(a)). The purpose of the two-year provision was to protect employers from "potential retroactive liability" imposed by the "varying and extended" state limitations periods that previously had applied to FLSA back wage claims (*ibid.*). See also *Laffey* v. *Northwest Airlines, Inc.*, 567 F.2d 429, 459-460 (D.C. Cir. 1976), cert. denied, 434 U.S. 1086 (1978) (*Laffey I*).

2-42 (1964)), the Administration proposed bills during the 89th Congress that, among other things, would have extended FLSA coverage to some 4,600,000 additional employees (but would not have increased the minimum wage). See 111 Cong. Rec. 10793 (1965); *Minimum Wage-Hour Amendments, 1965: Hearings on H.R. 8259 Before the General Subcomm. on Labor of the House Comm. on Education and Labor*, 89th Cong., 1st Sess. 7 (1965) (H.R. 8259 was the Administration bill) [*House Hearings*]; *Amendments to the Fair Labor Standards Act: Hearings on S. 763 et al., Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 89th Cong., 1st Sess. 43 (1965) (S. 1986 was the Administration bill) [*Senate Hearings*]. In addition to the extension of coverage, the Administration bills proposed to extend the two-year statute of limitations to three years for all violations. *House Hearings* 7; *Senate Hearings* 25. Secretary of Labor W. Willard Wirtz explained that, in his Department's experience, "the 2-year limitation freezes our claims before, as a practical matter, there has been time for the employee to be expected to be fully advised about them" (*House Hearings* 21). He stated (*id.* at 11; *Senate Hearings* 36):

> The lengthening of the statute of limitations to 3 years will allow workers more time to familiarize themselves with their legal right to back wages and thus improve enforcement of the act. The short statute of limitations gives competitive advantage to violators and penalizes many workers in the collection of wages legally due. The Federal criminal statute runs for 5 years and many other statutes run for 3 years or more. The existing 2-year period under FLSA is also shorter than allowed creditors of employees to collect money owed for food and rent bills.

See also 111 Cong. Rec. 10794 (1965) (statement of sponsor Sen. McNamara); *House Hearings* 54 (remarks of Secretary Wirtz) (the 3-year proposal would bring the statute in line with what most state statutes of limitations provide); *Senate Hearings* 694, 718-719 (testimony and statement of David Dubinsky) (the 2-year period "is much too short" because the Labor Department's investigative resources are too small and "[m]any workers do not know their legal rights or fear loss of jobs if they sue their employer for underpayments").

During the House Hearings, Rep. Martin, an opponent of the 1966 FLSA amendments (see 112 Cong. Rec. 21948 (1966)), questioned Labor Secretary Wirtz about why the Department needed a third year to enforce the Act, given that most violations were not "deliberate" (*House Hearings* 54). Secretary Wirtz responded that the department had in fact experienced difficulties in enforcement, notwithstanding that "in most cases" violations of the FLSA were "inadvertent[t]" and most employers voluntarily repaid back wages. He explained that the existing two-year limitations period excluded employees in a "substantial number" of cases from recovering back wages where the employer violated the law but would not voluntarily make repayment beyond the two-year period. *Ibid.*

Others affirmatively expressed concern about the effect of the proposed three-year limitations period on employers. Rep. Pucinski, a proponent of the amendments (see 112 Cong. Rec. 21948 (1966)), suggested that an increase in the limitations period would hurt the restaurant industry, which was to be newly cov-

ered by the FLSA (*House Hearings* 1118). He assured industry representatives that the subcommittee understood the problems of small businesses and did not intend to run roughshod over their problems (*id.* at 1118-1119). Some employer representatives expressed concern about the impact of a three-year limitations period on small businesses (*id.* at 2250-2251). Objections to extending the limitations period were lodged on the grounds that employees were already familiar with their rights under the FLSA and that many violations are unwitting, inadvertent, unsuspecting, unintended, the result of honest mistakes, misunderstanding, misinterpretation of technical provisions, and good faith efforts to comply with the FLSA. See *id.* at 394, 533-534, 980, 1014, 1151, 2050, 2059, 2076-2077, 2241-2242, 2250-2251.[17] See also *Senate Hearings* 737, 745-746, 771, 776, 799, 932-933, 1065-1066.

Following hearings on the bill, the House Committee reported out a bill (H.R. 10275, 89th Cong., 1st Sess. (1965)) that extended employee protection considerably beyond the Administration proposal. The bill's expansion of coverage to previously uncovered

[17] One employer representative described the predicament of an employer who unwittingly violated the Act because, "unbeknowst to him," the city acquired land near his farm and packing plant, thereby depriving him of an exemption dependent on certain mileage and population tests. *House Hearings* 394. See also *id.* at 1151 (employer was ignorant of whether a required percentage of customers were "household customers" under the exemption for certain laundries). In other cases, employers blamed technical complications involved in determining which employees were covered and which were exempt (*id.* at 2050), and ever-changing court rules and regulations, which created great uncertainty (*id.* at 2059, 2241-2242).

employees was almost double what the Administration had proposed, and the bill increased the minimum wage by 40% over two years for workers already covered by the Act and 75% over four and a half years for newly covered workers. See H.R. Rep. 871, 89th Cong., 1st Sess. 74 (minority views), 81 (supplemental views of Rep. Martin) (1965).[18] The Committee bill also modified the Administration's proposed increase of the limitations period from two to three years for all violations, providing instead for a three-year period only in cases of a "willful violation" (*id.* at 13, 42, 73). The Committee gave no explanation for the change. The two-tier statute of limitations was then included in H.R. 13712, 89th Cong., 2d Sess. (1966), which became the Fair Labor Standards Amendments of 1966. Except for quotations or straightforward descriptions of the provision in the Committee Reports (H.R. Rep. 1366, *supra*, at 46, 77; S. Rep. 1487, *supra*, at 36, 69; H.R. Conf. Rep. 2004, 89th Cong., 2d Sess. 15 (1966)), and on the floors of the Senate (112 Cong. Rec. 20481, 22652 (1966) (remarks of Sen. Yarborough)) and House (112 Cong. Rec. 11282 (1966) (remarks of Rep. Dent)), no mention was made of the statute of limitations amendment in the rest of the legislative process.

In sum, very little attention was paid in the legislative process to the proposed or ultimately enacted changes in the statute of limitations. With respect to Congress's decision to retain the two-year period for non-willful violations rather than adopt the Administration's proposed three-year rule for all cases, there

[18] The Senate Committee that held hearings on the Administration's Senate bill (S. 1986, 89th Cong., 1st Sess. (1965)) did not report out a bill.

is no "clearcut statement in the legislative history as to why the extension to three years was thus encumbered" (*Laffey* v. *Northwest Airlines, Inc.*, 567 F.2d 429, 460 (D.C. Cir. 1976), cert. denied, 434 U.S. 1086 (1978) (*Laffey I*)).

Although inferences from this limited legislative history must therefore be carefully drawn, it does not appear that the two-tier scheme embodies a congressional intent to punish "willful violations." Rather, the scant history available reflects a congressional balancing of the goal of affording employees additional protection and the desire to relieve employers of hardships from certain unexpected liabilities (as variously described by employer representatives). While extending the FLSA's protection of employees even further than the Administration had proposed, Congress was concerned that the broad expansion of the Act's coverage, and large minimum wage increases, would "bear too heavily upon an inevitably larger group of excusably inadvertent violators," including newly covered small businesses (*Laffey I*, 567 F.2d at 460 (footnote omitted)). See *Laffey* v. *Northwest Airlines, Inc.*, 740 F.2d 1071, 1085-1087 (D.C. Cir. 1984), cert. denied, 469 U.S. 1181 (1985) (*Laffey II*) (reaffirming *Laffey I*'s analysis of the legislative history). This balance of congressional policies—the employer-protection objectives of the two-tier statute of limitations and Congress's clear employee-protection aims—suggests that the two-year period should be available only to those employers who, though eventually found liable for violating the law, could not reasonably have anticipated the liability. Employers should bear the burden of the third year of liability when they engage in pay practices without resolving legal uncertainties.

3. The post-enactment judicial and legislative history of Section 255(a)'s two-tier statute of limitations likewise supports adoption of a standard that leaves the risk of uncertain pay practices more squarely on employers than the *Thurston* standard would seem to do. Beginning with the 1972 case of *Coleman* v. *Jiffy June Farms, Inc.*, 458 F.2d at 1142, and for more than a dozen years thereafter, the courts of appeals uniformly construed "willful violation" in Section 255(a) to require something less than knowing or reckless disregard of the FLSA's requirements—in most circuits, a mere recognition that the FLSA might apply; in a few circuits, some failure to resolve uncertainties.[19] Not until this Court decided

[19] See, *e.g.*, *EEOC* v. *Central Kansas Medical Center*, 705 F.2d 1270, 1274 (10th Cir. 1983) (citations omitted) (employer " 'was, or should have been, cognizant of an appreciable possibility that the employees involved were covered by the statutory provisions' "); *Donovan* v. *Carls Drug Co.*, 703 F.2d 650, 652 (2d Cir. 1983) ("(1) [employers] know that their business is subject to FLSA and (2) their practices do not conform to FLSA requirements"); *Donovan* v. *KFC Nat'l Mgmt.*, 682 F.2d 603, 605 (6th Cir. 1982) (original quotations marks omitted) ("an employer who knows he may be subject to the Act and proceeds voluntarily to engage in conduct which he knows may violate the Act has done so willfully"); *Marshall* v. *Erin Food Services, Inc.*, 672 F.2d 229, 231 (1st Cir. 1982) ("the employer knew or had reason to know that the FLSA was applicable to its employment practices"); *Marshall* v. *Union Pac. Motor Freight Co.*, 650 F.2d 1085, 1092-1093 (9th Cir. 1981) (same as *EEOC* v. *Central Kansas Medical Center, supra*); *Laffey I*, 567 F.2d at 461-462 (footnote omitted) (employer's violation is willful "at the very least • • • when he is cognizant of an appreciable possibility that he may be subject to the statutory requirements and fails to take steps reasonably calculated to resolve the doubt"); *Coleman* v. *Jiffy June Farms, Inc.*, 458 F.2d

Thurston in 1985 did any court of appeals hold that a finding of willfulness under the FLSA statute of limitations required knowing or reckless disregard of the law. In those many years, Congress took no action to "correct" the judicial decisions.

Significantly, Congress enacted amendments to the FLSA generally, and to Section 255 in particular, in 1974. The amendment to Section 255 simply added Subsection (d)[20] and did not alter the "willful violation" standard of Section 255(a), although *Jiffy June* had been decided two years earlier. In the Senate debate, moreover, Senator Taft, an opponent of the proposed amendments (120 Cong. Rec. 5743 (1974)), included in the record a memorandum that described *Jiffy June* as the then-prevailing interpretation of willfulness under Section 255(a) (120 Cong. Rec. 4709-4710 (1974)). He explained: "'Wilful' has been interpreted by the courts to mean an awareness of the existence of the FLSA. *Brennan* v. *J.M. Fields, Inc.*, 488 F.2d 443, 72 L.C. Para. 32993 (5 Cir. 1974). *Coleman* v. *Jiffy June Farms, Inc.*, 458 F.2d 1139 (5 Cir. 1972)." He further explained that,

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at 1142 ("the employer knew or suspected that his actions might violate the FLSA. Stated most simply, we think the test should be: Did the employer know the FLSA was in the picture?").

[20] In *Employees of the Dep't of Public Health & Welfare* v. *Department of Public Health & Welfare*, 411 U.S. 279 (1973), this Court held that the FLSA had not provided for suit by state employees against their state employers. Congress overturned that result in the 1974 amendments. In new Subsection (d), it extended the statute of limitations to allow six additional months from the effective date of the 1974 amendments for suit by state employees who had originally brought suit prior to this Court's decision.

under this view of willfulness, "an act committed in good faith may yet be wilful" (120 Cong. Rec. 4710 (1974)). Notwithstanding that explicit focus on the judicial construction of willfulness, Congress amended Section 255 without addressing the "willful violation" standard of Section 255(a).

4. The purposes, the general approach to interpretation, and other provisions of the FLSA also support a reading of "willful violation" that requires employers to bear the risk of error resulting from their own questionable pay practices. The FLSA is a broadly remedial statute, enacted to eliminate "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers," and to ensure that the payment of substandard wages is not used as a method of competition in interstate commerce (29 U.S.C. 202(a)). The Act has accordingly long been interpreted "'liberally to apply to the furthest reaches consistent with Congressional direction'" (*Tony & Susan Alamo Found.* v. *Secretary of Labor*, 471 U.S. at 296 (citation omitted)). See *Mitchell* v. *Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960); *Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697, 706-707 (1945); *Tennessee Coal, Iron & R.R.* v. *Muscoda Local No. 123*, 321 U.S. 590, 597 (1944); *Overnight Motor Transp. Co.* v. *Missel*, 316 U.S. 572, 576, 578 (1942). Thus, the provisions defining the coverage of the Act have been construed broadly (*Tony & Susan Alamo Found.*, 471 U.S. at 295; *United States* v. *Rosenwasser*, 323 U.S. 360, 362-363 (1945)), and exemptions from the Act are construed narrowly, with the burden resting on employers that claim exemptions to prove that they come "plainly and unmistakably within their terms and

spirit" (*Arnold* v. *Ben Kanowsky, Inc.*, 361 U.S. at 392, 394 n.11 (footnote omitted); see *A.H. Phillips, Inc.* v. *Walling*, 324 U.S. 490, 493 (1945)). Especially in light of Congress's recognition of the principle of liberal construction of employee protections when it enacted the 1966 FLSA amendments (see H.R. Rep. 1366, *supra*, at 10; H.R. Rep. 871, *supra*, at 9), there is "no reason to deviate from [that] traditional approach" in construing Section 255(a) (*Citicorp Indus. Credit, Inc.* v. *Brock*, No. 86-88 (June 22, 1987), slip op. 8).

This interpretation of Section 255(a) finds further support in two specific provisions of the FLSA. First, 29 U.S.C. 259, enacted as part of the Portal-to-Portal Act of 1947, provides that employers may be relieved of all liability if, in pursuing pay practices that are later found unlawful, they relied in good faith on certain administrative actions. In order to qualify for that protection, however, the employer must carry the burden of proving good faith reliance (29 U.S.C. 259(a)). Moreover, only certain actions of the official charged with administering the FLSA, and not those of any other agency or agency officer, may be relied on in FLSA cases (29 U.S.C. 259(b)); and if a "regulation, order, ruling, approval, or interpretation," as opposed to a practice or enforcement policy, is relied on, it must be in writing (29 U.S.C. 259(a)). These stringent conditions contrast with the conditions for employer protection applicable under 29 U.S.C. 258 to employer actions taken prior to the enactment of the 1947 Act. For such actions, while the burden of proof was on the employer, any administrative agency could be relied on, not just the Administrator, and there was no requirement of a writing. The adoption of more stringent conditions

for post-1947 pay practices reflected a careful compromise between House and Senate bills. See H.R. Conf. Rep. 326, 80th Cong., 1st Sess. 15-17 (1947); S. Rep. 48, 80th Cong., 1st Sess. 51 (1947); H.R. Rep. 71, 80th Cong., 1st Sess. 7 (1947).

Similarly, 29 U.S.C. 260 offers another form of protection from employer liability, but denies it to certain employers that engage in questionable conduct. While liquidated damages in an amount equal to wrongfully withheld back wages are presumptively mandatory in actions under 29 U.S.C. 216(b) and (c), Section 260 allows a defense to such liability if an employer "shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the [FLSA]" (29 U.S.C. 260). See 29 C.F.R. 790.22(b). Under this standard, the employer must show more than a good faith belief that his conduct *might* turn out not to violate the Act; he must show a good faith and objectively reasonable belief that his conduct "was not a violation" (29 U.S.C. 260). Moreover, the provision has long been understood to require employers to make affirmative efforts to ensure their compliance with the Act. See, *e.g.*, *Williams* v. *Tri-County Growers, Inc.*, 747 F.2d 121, 129 (3d Cir. 1984) (provision requires "attempting to ascertain the Act's requirements"); *Addison* v. *Huron Stevedoring Corp.*, 204 F.2d 88, 93 (2d Cir. 1953) (in addition to objective reasonableness, provision requires "an honest intention to ascertain what the [FLSA] requires and to act in accordance with it"); see also *Joiner* v. *City of Macon*, 814 F.2d 1537, 1539 (11th Cir. 1987). And even if an employer makes the showing of good faith and reasonable grounds, relief from liquidated damages is

not automatic; rather, Congress expressly left it to the discretion of the district court whether to reduce or to eliminate liquidated damages (29 U.S.C. 260). See 29 C.F.R. 790.22(b); *Laffey I*, 567 F.2d at 465.[21]

[21] Section 216(a)'s restriction of its criminal sanction to willful violations does not suggest that the FLSA statute of limitations requires a reckless disregard standard. First, as a criminal provision, Section 216(a) serves a wholly different purpose from that served by the FLSA statute of limitations: it is specifically designed to punish culpable conduct. Moreover, Section 216(a) and Section 255(a) are never both at issue in the same case, because a criminal prosecution under Section 216(a) is subject to the general federal criminal five-year statute of limitations, 18 U.S.C. 3282, not to Section 255(a). Further, the provisions were enacted by different Congresses (Section 255(a) by the 89th, Section 216(a) by the 75th); and in the legislative history of the enactment of the two-tier scheme of Section 255(a), there is no reference to the criminal prohibition of Section 216(a). Finally, willfulness under Section 216(a) has long been understood, and was understood in 1966, to require simply that "the act was deliberate, voluntary and intentional as distinguished from one committed through inadvertence, accidentally or by ordinary negligence" (*Nabob Oil Co.* v. *United States*, 190 F.2d at 480 (footnote omitted); see *United States* v. *Heilig*, 137 F. Supp. 462, 466 (D. Md. 1956)), a standard that does not clearly require reckless disregard and, indeed, has apparently even been construed to be equivalent to the *Jiffy June* standard. See *F.X. Messina Constr. Corp.* v. *Occupational Safety & Health Review Comm'n*, 505 F.2d at 702, cited in *Thurston*, 469 U.S. at 127 n.20. See note 12, *supra*.

Of course, a single term may have different meanings even in different parts of the same statute, let alone in different statutes, if the contexts, purposes, and circumstances are different. See, *e.g.*, *Puerto Rico* v. *Shell Co.*, 302 U.S. 253, 258-259 (1937); *Helvering* v. *Stockholms Enskilda Bank*, 293 U.S. 84, 87-88 (1934); *Donovan* v. *Bel-Loc Diner, Inc.*, 780 F.2d 1113, 1117 (4th Cir. 1985); *Secretary of Labor* v. *Daylight Dairy Products, Inc.*, 779 F.2d 784, 789 (1st Cir. 1985).

In sum, a reading of the "willful violation" language as placing the risk of liability for the third year on employers who engage in uncertain pay practices comports with the FLSA as a whole. As the District of Columbia Circuit said in *Laffey I* (567 F.2d at 461) in discussing the proper interpretation of that language, there is "no good reason for translating the employer's error into a loss of pay for the employee." Not only does the standard of willfulness under Section 255(a) act as a limitation on compensatory (as distinguished from punitive) awards, but employers are in a much better position to ascertain the legality of their pay practices than are employees. It is appropriate that they be required to do so—as employers are required to show similar diligence under Sections 259 and 260—if their violations are to be deemed other than willful and thus their liability limited to a period of two years.[22]

C. A Violation Of The FLSA Should Be Deemed Willful Within The Meaning Of The FLSA Limitations Provision Whenever An Employer Recognizes It May Be Covered By The FLSA And Acts Without A Reasonable Basis For Believing It Is Complying With The Statute

Since this Court's decision in *Thurston*, three courts of appeals—the Third Circuit in this case, the

[22] An additional consideration is that employees may not be aware or sufficiently confident of their rights until the Department of Labor investigates and uncovers violations; and those who depend on their employers for a livelihood and fear retaliation for protesting employer pay practices, or who make only the minimum wage and lack bargaining power, may be very reluctant to pursue rights to which they suspect they are entitled. See *House Hearings* 718-719; cf. *Mitchell* v. *Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292-293 (1960).

Seventh Circuit in *Walton* v. *United Consumers Club, Inc.*, *supra*, and the Fifth Circuit in *Peters* v. *City of Shreveport*, 818 F.2d 1148, 1167-1168 (1987)—have construed "willful violation" in Section 255(a) to encompass only conduct that is knowingly or recklessly in violation of the law. Nine other courts of appeals adhere to interpretations that render a wider range of employer conduct willful and hence subject to the third year of liability. Although the courts' formulations vary, most of those courts have adopted a standard understood to be equivalent to the "in the picture" standard articulated by the Fifth Circuit in *Jiffy June* and applied by the district court (at our urging) in this case. Such courts find a violation willful under Section 255(a) if the "employer knew, or should have known, that there was an appreciable possibility that the employees involved were covered by the Act" (*EEOC* v. *First Citizens Bank*, 758 F.2d 397, 401 (9th Cir.), cert. denied, 474 U.S. 902 (1985)).[23] On the other hand, the District

[23] See *Crenshaw* v. *Quarles Drilling Corp.*, 798 F.2d 1345, 1350 & n.6 (10th Cir. 1986) (citations omitted) ("violation is willful if 'the employer knew that the Act was "in the picture" and was aware of the Act's possible application to his employees' "); *Donovan* v. *Bel-Loc Diner, Inc.*, 780 F.2d 1113, 1117 (4th Cir. 1985) (violation is willful when employer knew FLSA was " 'in the picture' and, thus, might govern the employer's conduct"); *Secretary of Labor* v. *Daylight Dairy Products, Inc.*, 779 F.2d at 789 (citation omitted) (" 'the employer knew or had reason to know that the FLSA was applicable to its employment practices' "); *Brock* v. *Georgia Southwestern College*, 765 F.2d 1026, 1039 (11th Cir. 1985) (citation omitted) (employer "knew that the Act was 'in the picture' regardless of the defendant's good faith"); *Donovan* v. *Carls Drug Co.*, 703 F.2d at 652 ("(1) [employers] know that their business is subject to FLSA and (2) their practices do not conform to FLSA requirements").

of Columbia Circuit adheres to a standard that appears to fall somewhere between the *Thurston* standard and the *Jiffy June* standard, finding an employer's noncompliance willful "at the very least * * * when he is cognizant of an appreciable possibility that he may be subject to the statutory requirements and fails to take steps reasonably calculated to resolve the doubt" (*Laffey I*, 567 F.2d at 461-462 (footnote omitted)). See *Laffey II*, 740 F.2d at 1085-1087 (standard reaffirmed).[24]

While we believe, as we have explained, that *Thurston*'s knowing or reckless disregard standard sets too high a threshold before employee recovery may be extended from two to three years under the FLSA statute of limitations, we also now believe that the *Jiffy June* "in the picture" standard sets too low a threshold. As this Court found in *Thurston* (469 U.S. at 128), the "in the picture" standard seems to give too little effect to Congress's express intent to create two tiers of liability in the FLSA limitations provision. Among employers eventually found to have violated the FLSA, it would seem that there are

[24] For the standards adopted by the Eighth and Sixth Circuits, see *Nolting* v. *Yellow Freight System, Inc.*, 799 F.2d 1192, 1197-1198 (8th Cir. 1986) (employer "knew or suspected" that its practices violated statutory requirements), and *Donovan* v. *KFC Nat'l Mgt. Co.*, 682 F.2d at 605 (citation omitted) (" 'an employer who knows he may be subject to the [FLSA] and proceeds voluntarily to engage in conduct which he knows may violate the [FLSA]' ").

In *Hickman* v. *United States*, 10 Cl. Ct. 550, 554 (1986), the Claims Court stated that the appreciable possibility standard made sense for private employers but not for the federal government as an employer. An FLSA violation by the government, the court held, is non-willful whenever there is significant uncertainty about the FLSA's application.

not many who did not know that the Act was "in the picture."[25] It may be "virtually impossible for an employer to show that he was unaware of the Act and its potential applicability" (*ibid.*). In addition, the *Jiffy June* standard would impose a third year of liability even on those employers who firmly and reasonably (albeit wrongly) believe that their pay practices are lawful, a result that seems counter to the concerns expressed in the legislative process during the 89th Congress. Finally, in imposing the third year of liability on an employer as soon as it is aware that the FLSA is in the picture, the *Jiffy June* standard neutralizes the two-tier limitations scheme as a possible incentive for the employer to seek further advice about how to conform its practices to law.

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[25] It is nonetheless true that some courts applying standards based on *Jiffy June* have found violations nonwillful. See, *e.g.*, *Marshall* v. *Root's Restaurant, Inc.*, 667 F.2d 559, 561 (6th Cir. 1982) (citing *Marshall* v. *Union Pac. Motor Freight Co.*, 650 F.2d 1085, 1092-1093 (9th Cir. 1981)); *EEOC* v. *Governor Mifflin Sch. Dist.*, 623 F. Supp. 734, 738 (E.D. Pa. 1985); *Donovan* v. *I & J, Inc.*, 567 F. Supp. 93, 107 (D.N.M. 1983); *Marshall* v. *Molly Murphy's, Inc.*, 26 Wage & Hour Cas. (BNA) 787, 790 (W.D. Okla. 1980). Moreover, the proportion of such employer victories in court may be lower than the proportion of non-willful violations as a whole, because most FLSA violations do not result in litigation and voluntary settlement is more likely with inadvertent violations than with more knowledgeable violations (cf. *House Hearings* 54 (testimony of Secretary of Labor Wirtz) (most inadvertent violations are settled)). Of the 69,249 minimum wage and overtime investigations conducted by the Department of Labor in fiscal year 1987, 52,824 cases involved violations, 47,887 of the violators agreed to pay some amount of back wages, 1217 cases were referred to the Solicitor of Labor for possible litigation, and an even smaller number were actually litigated.

See Note, *Standards of Willfulness Under the Fair Labor Standards Act*, 78 Mich. L. Rev. 626, 632-633 (1980). In that respect, the "in the picture" standard might actually lead to more violations than a standard that encourages the seeking of reliable advice.

A standard based on the formulation in *Laffey* and akin to the standard found in 29 U.S.C. 260, we believe, results in the most appropriate interpretation of the FLSA's limitation provision. Specifically, an employer's violation should be held willful if the employer, recognizing it may be covered by the FLSA, acted without a reasonable basis for believing that it was complying with the statute. Such a basis may be absent because the employer failed to seek a reliable determination of its obligations under the FLSA or because the advice it received afforded no sound basis for eliminating existing uncertainties about the employer's compliance.

As the District of Columbia Circuit (and most other courts of appeals) have concluded, the first step of the inquiry should be whether an employer, in violating the law, knew that there was an appreciable possibility that the law applied to its business. If not, it should be excused from a third year of liability, in accord with the congressional intent to free the entirely inadvertent violator from this obligation. As we have noted, however, among employers eventually found to have violated the FLSA, most probably can be charged with awareness of an appreciable possibility that their pay practices were covered by the statute. With respect to such an employer, the inquiry should turn to whether the employer took steps to determine its legal obligations and to fulfill them. If the employer took no such steps, it should be obligated to compensate its em-

ployees for the third year of its illegal pay practices. There is no indication that Congress intended to reward an "ostrichlike cultivation of ignorance" (*Brennan* v. *Heard*, 491 F.2d at 3) by excusing from a third year of liability an employer that failed reasonably to investigate its FLSA responsibilities, with awareness that the FLSA might apply to its business.[26] On the other hand, a defense to an alleged "willful violation" should be available to an employer that can prove that it took steps reasonably calculated to resolve the doubt as to the validity of its employment practices and relied on reasonable advice eliminating uncertainties as to the legality of its pay practices.

The standard we propose respects Congress's intent to create two tiers of liability under the statute of limitations. In this regard, and in substance as well, it bears a resemblance to the Section 260 requirement that, to obtain a reduction of liquidated damages, an employer must show good faith reliance on reasonable grounds for believing its conduct did not

[26] It may be, as we have noted (see pages 19-20, *supra*), that the *Thurston* standard itself might allow a finding of willfulness when an employer fails to inquire further once aware of an appreciable possibility that its business is governed by the FLSA. See *Brock* v. *Wilamowsky*, No. 87-6026 (2d Cir. Oct. 30, 1987), slip op. 18-19; *Glenn* v. *General Motors Corp.*, 658 F. Supp. 918, 927 (N.D. Ala. 1986); *EEOC* v. *Westinghouse Elec. Corp.*, 646 F. Supp. 555, 563 (D.N.J. 1986) (citations omitted), appeal pending, No. 87-5174 (3d Cir. argued Oct. 20, 1987). If the failure to investigate must also be reckless, however, the *Thurston* standard might not be met. See *Gilliam* v. *Armtex, Inc.*, 820 F.2d at 1390. In any event, we do not think Congress intended the amount of an employee's FLSA back pay to depend on whether the employer's failure to investigate its legal responsibilities may be excused as something short of reckless.

violate the FLSA. This standard also provides an incentive to employers to seek advice to conform their pay practices to the law and thus makes violations less likely. It places in employers' hands a substantial degree of control over whether they will be subject to a third year of back pay. And consistent with the congressional balance of policies embodied in Section 255(a) and in the FLSA as a whole, it places on the employers rather than employees the risk of legally uncertain conduct. See *Donovan* v. *KFC Nat'l Mgt. Co.*, 682 F.2d at 605 (an employer willfully violates the FLSA when it relies on attorney's advice that it is partially exempt from the FLSA's overtime requirements but is aware of a Department of Labor opinion to the contrary); compare *Whitfield* v. *City of Knoxville*, 756 F.2d at 463-464 (a violation of the ADEA is not willful under the *Thurston* standard if the employer continues particular practices in the face of divided court opinions as to their legality).[27]

II. AS FAR AS THE PRESENT RECORD SHOWS, RESPONDENT PURSUED PAY PRACTICES THAT DO NOT REFLECT RELIANCE ON SOUND ASSURANCES OF COMPLIANCE WITH THE STATUTE

Under the standard we propose, the only conclusion possible on the present record in this case is that respondent willfully violated the FLSA for purposes

[27] If an employer seeks to rely on attorney advice as a defense, it must be held to have waived any attorney-client privilege it might otherwise have regarding such advice. See, *e.g.*, *Hunt* v. *Blackburn*, 128 U.S. 464, 470 (1888); *In re Continental Illinois Securities Litigation*, 732 F.2d 1302, 1314-1315 & n.20 (7th Cir. 1984); *United States* v. *Woodall*, 438 F.2d 1317, 1324 (5th Cir. 1970) (en banc), cert. denied, 403 U.S. 933 (1971).

of Section 255(a). Respondent's general manager admitted that he was aware that the FLSA applied to his business (Pet. App. 15a; J.A. 28). There is no evidence in the record to indicate that respondent ever undertook an inquiry into the legality of its pay plan for mechanics. In fact, the record shows that respondent's general manager simply turned over payroll matters to a bookkeeper who he believed would "know how to handle" them (J.A. 29-30).

Even if respondent had undertaken some inquiry, moreover, it is hard to see how the pay plan could conceivably have rested on sound advice that it complied with the statute. Respondent sought to defend its plan only under the well-established Belo plan exception to the FLSA's overtime requirements. See 29 U.S.C. 207(f); 29 C.F.R. 778.402-778.414; *Walling* v. *A.H. Belo Corp.*, *supra*. Employers have been on notice for at least 20 years, however, that the Department of Labor and courts require employers that claim such an exemption to prove, among other things, that the nature of an employee's work necessitates wide and unpredictable fluctuations in the numbers of hours an employee works, both above and below 40 hours a week. See, *e.g.*, *Foremost Dairies, Inc.* v. *Wirtz*, 381 F.2d 653, 657-661 (5th Cir. 1967), cert. denied, 390 U.S. 946 (1968); 29 C.F.R. 778.406; Annotation, 5 A.L.R. Fed. 793, 810-812 (1970). This requirement is necessary "because any other construction of [the Belo plan exception] would seriously challenge the effectiveness of Section 7(a) of the Act," which sets the general overtime requirements (*Foremost Dairies, Inc.* v. *Wirtz*, 381 F.2d at 660). "Obviously, Belo plans are not allowable merely because they allow an employer to work employees forty hours a week without paying them

time and one-half" (Pet. App. 12a). In light of those judicial and administrative pronouncements, no employer relying on sound advice would regularly work its employees more than 40 hours a week, as respondent did (see *id.* at 13a-14a; J.A. 34-61), and then expect to meet the requirements of the Belo plan exception.[28]

Although the present record would seem to support summary judgment against respondent on the issue of Section 255(a) willfulness, the record was developed in light of a different legal standard from the one we now urge. Accordingly, respondent should be afforded an opportunity to present new evidence, including evidence of any efforts it undertook to secure reliable assurances that its pay practices complied with the FLSA. If respondent acknowledges in this Court that there is no such evidence, this Court should order affirmance of the district court judgment. Otherwise, the case should be returned to the district court for further proceedings on the third year of backpay liability.

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[28] The Belo plan exception also requires that any fluctuation must result from the nature of an employee's duties (29 U.S.C. 207(f)), which means that "neither [the employee] nor his employer can either control or anticipate with any degree of certainty the number of hours he must work from week to week" (29 C.F.R 778.405). Accordingly, respondent had no sound basis for seeking to prove significant fluctuation of work weeks below 40 hours based almost entirely on weeks that resulted in less than 40 hours of work only because of holidays or vacation days or mechanics' performance of some other kind of work (Pet. App. 14a). There are, in addition, unexplained inconsistencies in respondent's payroll records and wage payments, which call into question whether respondent was even following its purported pay plan (see page 8, *supra*).

CONCLUSION

The judgment of the court of appeals should be vacated.

Respectfully submitted.

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NOVEMBER 1987

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RESPONDENT'S

BRIEF

QUESTIONS PRESENTED

1. Whether the petitioner having abandoned its legal position advanced before the district court and the court of appeals, is barred from further proceedings, as seeking an advisory opinion.

2. Was the court of appeals correct in determining that a violation of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. (& Supp. III) 201 et seq., is "willful" within the meaning of the applicable statute of limitations, 29 U.S.C. 255(a), only where the employer, in acting contrary to the statute, knew that, or showed reckless disregard for whether, its conduct was prohibited by the FLSA.

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NO. 86-1520

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

ANN McLAUGHLIN, SECRETARY OF LABOR,

UNITED STATES DEPARTMENT OF LABOR,

Petitioner

vs.

RICHLAND SHOE COMPANY

ON WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 799 F.2d 80. The opinion of the district court (Pet. App. 10a-17a) is reported at 623 F.Supp. 667.

JURISDICTION

The judgment of the court of appeals (Pet. App. 22a-23a) was entered on August 26, 1986. A petition for rehearing with suggestion for rehearing en banc was denied on October 23, 1986 (Pet. App. 24a). Justice Brennan extended the time within which to file a petition for a writ of certiorari to March 19, 1987. The petition was filed on that date and granted on October 5, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 6 of the Portal-to Portal Act of 1947, as amended, 29 U.S.C. 255, provides, in relevant part:

> Any action * * * to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended * * *, the Walsh-Healey Act * * *, or the Bacon-Davis Act * * *-
> (a) * * * may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued.

STATEMENT

The Secretary filed a Complaint against the respondent alleging violation of the overtime compensation section of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. (& Supp. III) 201 et

seq. The Act requires that covered employers pay one and one half times the employee's regular rate for hours worked overtime. As noted above, the Portal-to-Portal Act provides that a cause of action for unpaid overtime under the FLSA is subject to a two-year limitation, "except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued." 29 U.S.C. 255(a).

Respondent employed mechanics to repair and to maintain machinery in its plant where foot-wear was manufactured. The district court, relying upon the standard advanced in the case Coleman v. Jiffy June Farms, Inc., 458 F(2d) 1139, 1142 (Did the Employer know that the FLSA was in the picture) held that the respondent had violated the provisions of

the FLSA by paying a weekly salary on a base week of 48 hours and paying one and one-half times regular pay for hours in excess of that base week. (Pet. App. 13a-17a)

From a judgment entered against it by the district court the respondent appealed. The court of appeals while dismissing other grounds of the appeal, sustained the respondent's position that the applicable statute of limitations was two years; hence, the Secretary could not seek payment of overtime reimbursement beyond that period. The petitioner's request for reargument was denied by the circuit court. Petitioner then petitioned herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit, which petition was granted. In both the district court and court of

appeals the petitioner relied upon the Jiffy June Farms rule of law. In the instant proceedings, the petitioner abandons that theory and, for the first time in this case advances a new basis for seeking the vacation of the judgment of the court of appeals: that "...an employer's unlawful pay practice should be found willful for purposes of the FLSA limitations provision when the employer is aware of the potential application of the FLSA but pursues the pay practices without reliable assurance of their legality." (Pet. brief 13)

SUMMARY OF ARGUMENT

The repondent submits that the writ should be dismissed for any of the following reasons:

1. That the petitioner, having abandonded its position espoused in both the district court and the circuit court,

is using this case as a vehicle to resolve general legal issues and is really seeking an advisory opinion.

2. The the decision of the circuit court is sound and well founded in law and logic.

3. That applying even the less demanding test now advanced by the petitioner, there is no basis for extending the limitations provision to three years.

ARGUMENT

1. THE PETITIONER IS SEEKING AN ADVISORY OPINION AND IS NOT ENTITLED TO ONE.

It is recognized that the petitioner has an interest in resolving the conflict in views of the different circuits. Respondent acknowledges, also, the slight lingering of a claim against the respondent and that a total abandonment of same has not occurred. However, this case emerged

and was pursued on a legal theory no longer recognized by the petitioner as a valid one. The respondent defended against that legal position. It is well settled that in order for a federal court to act, the moving party must present a justiciable case or controversy. In this instance the petitioner should not be permitted to transform the issue in this case to a quest for clarification of conflicts. This, it is submitted is tantamount to seeking an advisory opinion. As stated in Laird v. Tatun 408 U.S. 1, 14(1972): "the federal courts established pursuant to Article III of the Constitution do not render advisory opinions".

2. THE DECISION OF THE CIRCUIT COURT IS SOUND AND WELL FOUNDED IN LAW AND LOGIC.

The court of appeals decision is correct in law and logic. As pointed out by that court:

> A willful act requires a deliberate effort, more than mere negligence. Webster's New Collegiate Dictionary 1331 (1979) defines "willful" to mean "done deliberately: intentional." The "words of statutes...should be interpreted where possible in their ordinary, everyday senses." Malat v. Riddell, 383 U.S. 569, 571 (1966) (per curiam). At the very least a willful act requires reckless disregard of the consequences: there is no special, legal definition of the term.

In support of its determination, the circuit court quotes from the case of Trans World Airlines, Inc. v Thurston, 469 U.S. 111(1985):

> '(I)t would be virtually impossible for an employer to show that he was unaware of the Act and its potential applicability. Both the legislative history and the structure of the statute show that Congress intended a two-tiered liability scheme. We decline to interpret the liquidated damages provision of ADEA in a manner that frustrated this intent.' (7a)

The same view of the FLSA limitations provisions has been taken in Walton v. United Consumers Club, Inc., 786 F2d. 303

(7th Cir. 1986) and Peters v. City of Shreveport, 818 F2d. 1148 (5th Cir. 1987).

It is true as petitioner states that, "This Court has repeatedly recognized that 'willful', is a word of many meanings, its construction often being influenced by its context" (Petitioner's brief 15). Petitioner then cites several cases among which were United States v. Bishop, 412 U.S. 346(1937). This Court in United State v. Pomponia, 429 U.S. 10, 12(1976), in discussing Bishop stated as to the term "willfully", that "We did not, however, hold that the term requires proof of any motive other than an intentional violation of a known duty," which is in keeping with the holding of the court of appeals in the instant case. It is a use of the term in its ordinary meaning: an intentional act.

The petitioner seeking to find support in the legislative history,

inconsistently admits (Petitioner's brief page 29) that "In sum, very little attention was paid in the legislative process to the proposed or ultimately enacted changes in the statute of limitations" and that "the legislative history of the limitations provision contains no suggestion that the 'willful violation' standard was intended to punish employers." (Petitioner's brief page 12), and yet petitioner seeks to establish (Petitioner's brief page 12) "That history suggests, rather, that the standard was designed to provide employers with some protection from liabilities that they reasonably failed to anticipate, while allowing employees and the Department of Labor needed additional time to challenge unlawful pay practices." It is difficult to understand how challenging a willful violation would require additional time as

compared to that needed to challenge a non-willful violation. Nor does the petitioner explain its allegation that the court of appeals definition of willful violation" ... if left uncorrected, would frustrate the purposes of the FLSA." (Petitioner's brief page 15). More to the point in this case, how would those purposes be frustrated? The petitioner had two years to make an effort to correct violations; why should its lack of diligence be encouraged by broadening the definition of "willful"? Reason and logic would dictate that the longer period of limitation would be actually in the nature of a punitive provision. Further, where there is no legislative history to guide in understanding a statute, the plain meaning should and must prevail and that is the course taken by the circuit court.

To further support its argument on interpreting the statute rather than looking to its plain meaning, the petitioner urges (Petitioner's brief page 33) that "The FLSA is a broadly remedial statute, enacted to eliminate 'labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers' and to ensure that the payment of substandard wages is not used as a method of competition in interstate commerce."

It is suggested that a review of the facts of this case indicates no substandard wages. On the contrary, calculations from the record (J.A. 34-61) reveal the following average wages of the subject employees:

J. Cseari = $7.20
B. Keefer = $6.98
R. Brossman = $8.75

W. Padillas = $7.17
J. Hummel = $7.05
P. Dostick = $8.40
G. Sechrist = $9.33

Additionally, though not required to do so, the repondent paid bonuses, and holidays. (J.A. 30, 31).

3. EVEN UNDER THE TEST NOW ADVANCED BY THE PETITIONER, THERE IS NO BASIS FOR EXTENDING THE LIMITATION PROVISION TO THREE YEARS.

Even by the standards of Laffey I, 567 F.(2d), upon which the respondent relies there is still no willfulness shown. The petitioner does not point to the record to establish a violation using this standard. The petitioner points to a rule of law but to not one shred of evidence to meet the requirement of that rule. The petitioner, arguing that the appropriate standard is that established in Laffey states that: "Under the Laffey

standard, a violation is willful for FLSA limitations purposes if the employer "is cognizant of an appreciable possibility that he may be subject to the statutory requirements and fails to take steps reasonably calculated to resolve the doubt'". (Petitioner's brief pages 14, 15) In the instant case the employer did take steps not only to resolve any doubt that it was subject to the Act, but used the government coefficient table to calculate the overtime pay. The error in the petitioner's position is the attempt to use the Laffey case as a springboard for further restriction: "In our view, an employer's violation should be held willful if the employer, recognizing it may be covered by the FLSA, acts without a reasonable basis for believing that it is complying with the statute - either because it failed to seek a reliable

determination of its obligations under the FLSA or because the advice it receives affords no reliable basis for eliminating existing uncertainties about the employer's compliance". (Petitioner's brief page 15) That may be what the petitioner seeks as the law but is not what is established by the Laffey case. Respondent was acting with a reasonable basis that it was complying with the statute. The court of appeals recognizes that the respondent was acting in good faith in an attempt to fulfill its obligation under the Act by using the Department of Labor, Wage and Hour Division's coefficient table (J.A. 19,20) to compute the amount of overtime compensation due.(3a)

It is submitted that the real problem in the instant case lies with the petitioner's ostrich like (Petitioner's

brief page 42) view of the facts of this case leading to the allegation (Petitioner's brief page 13) that "... we find it hard to imagine how the plan could have been the product of good faith reliance or sound assurances of the plan's legality." The petitioner is ignoring the fact that the respondent is not IBM or General Motors, but a small business and petitioner seeks to hold such business to the same degree of care as the huge enterprise (though, as pointed out by the petitioner, concern was expressed in Congress about small businesses (Petitioner's brief page 28).

The petitioner states (Petitioner's brief page 13) that "We think an employer's unlawful pay practices should be found willful for purposes of the FLSA limitations provision when the employer is aware of the potential application of

the FLSA but pursues the pay practices without reliable assurances of their legality." The language still equivocates: reliable assurances of legality is required: What is "reliable" and whose "assurances"? Even were the employer to take steps to determine legal responsibilities, according to petitioner, that does not end the matter, it only may do so. The burden is further upon the employer to show that it received reasonable advice. Again, who determines what is reasonable advice? Must every employer - large or small, have house counsel, or have independent counsel pass on every aspect of its business? And will that review by counsel be considered sound assurance only when it coincides with the views of the petitioner? This could be a reasonable conclusion upon reading petitioner's elaboration of the

foregoing (Petitioner's brief pages 41-43).

Repondent's pay practices were such as would indicate a good faith attempt to meet the requirement of the Act, conceiving the program as the Belo exception, incorrectly considering any type of fluctuations to be encompassed in the Belo provision.

Petitioner points to the record as lacking evidence of respondent's inquiry into the legality of its pay plan for mechanics. This observation ignores the fact that the petitioner chose to base its case solely on its incomplete depositions and expose this small business to the expense of this protracted litigation.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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REPLY

BRIEF

(7)

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No. 86-1520

In the Supreme Court of the United States

OCTOBER TERM, 1987

ANN MCLAUGHLIN, SECRETARY OF LABOR, PETITIONER

v.

RICHLAND SHOE COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-1520

ANN MCLAUGHLIN, SECRETARY OF LABOR, PETITIONER[1]

v.

RICHLAND SHOE COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONER

We argue in our opening brief that the term "willful violation," as used in the Fair Labor Standards Act statute of limitations, should be read so that the longer, three-year limitations period applies to employers who, though aware of an appreciable possibility that the FLSA requirements apply to their businesses, fail to take steps to determine the statute's demands or, having taken such steps, do not secure a reasonable basis for eliminating uncertainties about their compliance. The language, purposes, and legislative history of the statute render this the most appropriate construction among the many that have been announced by the courts of appeals (Br. 31, 38-39).[2]

[1] Pursuant to Sup. Ct. R. 40.3, Ann McLaughlin is automatically substituted as petitioner in this case.

[2] Since our opening brief, two courts of appeals have addressed the meaning of "willful" in the context of the FLSA's limitations provision. In *Brock* v. *Shirk*, 833 F.2d 1326, 1329 n.2 (9th Cir. 1987), the

In their opposing briefs, respondent and amicus Equal Employment Advisory Council (EEAC) argue that the decision below is correct in adopting the willfulness test articulated in *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111 (1985). They also make a number of related assertions, concerning the disruption and unfairness that allegedly would result from the adoption of the Secretary's proposed test, especially from its application on other than a prospective basis.

Our opening brief outlines at length (Br. 19-30) the differences between the FLSA statute of limitations provision at issue here (29 U.S.C. 255(a)), and the liquidated damages provision that was involved in *Thurston* (29 U.S.C. 626(b)). Respondent concedes that "willful" is a word of many meanings (Resp. Br. 10) and neither it nor its amicus disputes that careful attention to context is necessary to determine the appropriate meaning. Nor do they persuasively dispute our conclusion that the willfulness requirement in the FLSA's statute of limitations is designed to protect certain employers from unanticipated liabilities, rather than to punish (as under the ADEA liquidated damages provision).

Respondent and amicus EEAC seek to support the court of appeals' application of a strict reckless disregard standard primarily upon the alleged intention of *Thurston* "to establish a uniform meaning for the term ['willful']" (EEAC Amicus Br. 8; see Resp. Br. 8-10). In fact, however, no such intent can be discerned from the Court's opinion in that case. In accepting the construction of willfulness enunciated by the Second Circuit in that case (though not that court's application of it), the Court in

court adhered to its "appreciable possibility" standard. In *Russo* v. *Trifari, Krussman & Fishel, Inc.*, No. 87-7517 (2d Cir. Jan. 8, 1988), the court adopted a "reckless disregard" standard.

Thurston expressly noted that there may be grounds for distinction in construing the term "willful" as it appears in Section 7(b) of the ADEA, 29 U.S.C. 626(b), and the FLSA provision at issue here, 29 U.S.C. 255(a). *Thurston*, 469 U.S. at 127-128.

The difference in contexts of the two provisions is compatible with some divergence in the meaning of the word "willful" as it appears in each statute. Section 7(b) of the ADEA, dealt with in *Thurston*, incorporates by reference specified enforcement provisions of the FLSA. The fact that it does not read into the ADEA all of the enforcement provisions of the FLSA (*e.g.*, 29 U.S.C. 216(a), the criminal enforcement provision), or that it does not trigger the liquidated damages provision of the FLSA, 29 U.S.C. 216(b) and (c), except upon proof of a certain concept of willfulness, speaks to the different objectives pursued and means chosen by the Congress that enacted the ADEA. The Court in *Thurston* relied explicitly (469 U.S. at 125-126) on the punitive character of the ADEA liquidated damages provision before it, a character wholly lacking here (Pet. Br. 24-30). The objectives that animated the Congresses that first enacted and, in 1966, amended the statute of limitations of the FLSA can fully account for any distinction that exists between the concepts of willfulness embodied in the two statutes.[3] Any such difference is only one more example—albeit within a single title of the United States Code—of the wide-ranging variety in constructions of willfulness embodied in federal law. See Pet. Br. 15-18.

[3] The statute of limitations determines the period over which backpay is to be awarded to employees who were paid at an illegally low rate. Backpay can be denied, if at all, "only for reasons which, if applied generally, would not frustrate the central statutory purposes." *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 421 (1975); see also *Mitchell* v. *Robert De Mario Jewelry, Inc.*, 361 U.S. 288, 292 (1960).

In any event, *Thurston* need not be read to embody a willfulness standard that is substantially different from the one we propose here. In our opening brief we note that *Thurston* has been construed differently by different courts (Br. 21 & n.14)[4] and that its "reckless disregard" standard need not be construed to require an especially high level of culpability on the part of employers. Indeed, *Thurston*'s application of its own standard suggests an approach not far from the one we propose. Thus, in supporting its conclusion that TWA had not acted in reckless disregard of the provisions of the ADEA, the Court in *Thurston* noted that "[t]he record makes clear that TWA officials acted reasonably and in good faith in attempting to determine whether their plan would violate the ADEA" (469 U.S. at 129), and that "[i]n an attempt to bring its retirement policy into compliance with the ADEA, while at the same time observing the terms of the collective-bargaining agreement, TWA sought legal advice and consulted with the Union" (*id.* at 130).

The concept of willfulness as a failure reasonably to resolve an uncertainty as to coverage should be viewed, at most, as a variation on *Thurston*'s standard that is appropriate in the non-punitive, compensatory-recovery context of the FLSA statute of limitations provision. For that reason, several of the arguments raised by respondents and amicus as to the consequences of the change in the government's position and the unfairness of applying to this case the standard we advocate are without merit.

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[4] The Tenth Circuit has construed *Thurston* to allow yet another variation on the "reckless disregard" standard for determining when an employer is liable for liquidated damages for a willful violation of the Age Discrimination in Employment Act. See *Cooper* v. *Asplundh Tree Expert Co.*, No. 85-2316 (10th Cir. Jan. 15, 1988) (in disparate treatment case, discrimination must be the "predominant factor" behind an employer's decision).

Contrary to the urging of respondent (Resp. Br. 7-8) and amicus EEAC (EEAC Amicus Br. 17-18), the Secretary's articulation for the first time in this Court of the appropriate willfulness standard does not offer any basis on which to deny consideration of the merits of her position.[5] The standard now advanced is fairly characterized as somewhere between the poles represented by the *Jiffy June* "in the picture" standard and *Thurston*'s reckless disregard standard adopted by the court below. Surely some formulation that draws elements from both of those standards, which represented the competing positions in the litigation in the lower courts, was always a possible resolution as this case progressed. The fact that the Secretary has now adopted a position that is some distance away from the *Jiffy June* standard—and toward the *Thurston* standard respondent supports—does not suggest that the discussion begun in the lower court as to the proper definition of the word "willful" cannot properly continue before this Court.

Nor, for very similar reasons, can the argument (EEAC Amicus Br. 26-28) be taken seriously that, in view of the change in the government's position, only prospective

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[5] The EEAC mistakenly asserts (EEAC Amicus Br. 18) that the standard proposed in our brief differs from the standard proposed in our certiorari petition. At both places we explained, in nearly identical language (Pet. 15; Pet. Br. 41) that an employer's violation is willful if the employer, recognizing it may be covered by the FLSA, acts without a reasonable basis for believing that it is complying with the statute—either because it fails to seek a reliable determination of its obligations under the FLSA, or because the advice it receives affords no reliable basis for eliminating existing uncertainties about the employer's compliance. The EEAC's partial quotation from the petition is actually one court's formulation of a willfulness standard that the Secretary identified as the basis, or starting point, for her proposed standard.

relief should be awarded if our substantive position is accepted.[6] The standard we propose is more favorable to respondent and other employers than the prevailing appreciable possibility standard that was applied by the district court. It will accordingly be easier in the future for employers to defend against a third year of liability under our standard than under the standard that governed this litigation until it reached the court of appeals. The inquiry under our standard does not end with a determination that the employer was aware of an appreciable possibility that the FLSA applied to its employees. Instead, under the standard we propose, employers may avoid a third year of backpay liability if their practices reflect reasonable reliance on advice resolving uncertainties as to legality (see Pet. Br. 42). It is not apparent how our standard would have altered respondent's conduct prior to this suit or its litigation in the district court would have been altered had our standard been in effect at that time.

The EEAC contends (EEAC Amicus Br. 18-24) that the standard we propose requires a drastic shift in the burden of proof and threatens to disrupt employers' relationships with their lawyers. The issue of which party has the burden of proof when the employer pleads the FLSA's statute of limitations as a defense is unresolved in the lower courts, where few courts have directly addressed the issue.[7] The

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[6] A decision of this Court is normally retroactive in application. See *Solem* v. *Stumes*, 465 U.S. 638, 642 (1984). In the civil context, however, the Court may conclude that an exception is required after considering (1) whether the decision "establishe[s] a new principle of law, either by overruling clear past precedent on which litigants may have relied * * * or by deciding an issue of first impression whose resolution was not clearly foreshadowed * * *;" (2) "whether retrospective operation will further or retard [the operation of the rule in question]"; and (3) "the inequity imposed by retroactive application." *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106-107 (1971).

[7] It is well settled in the lower courts that the employer must at least plead the FLSA statute of limitations as a defense. See, *e.g.*, *Lopez* v.

question of burden of proof has not been litigated in this case, and it is not at issue now. It would be fairly presented only where the evidence on a particular issue was in equipoise. Nothing about the willfulness concept we propose requires or foreshadows a resolution of the burden of proof issue one way or the other.

Similarly, the EEAC seriously overstates the disruption possible from requiring employers to take steps to resolve doubts about the legality of their pay practices. A similar mechanism for relief from liquidated damages has existed for over 40 years under Section 11 of the Portal-to-Portal Act, 29 U.S.C. 260 (see Pet. Br. 35)—although there the burden of proof is clearly on the employer—and has caused no noticeable impairment in the way employers do business.[8] Only where an employer faces uncertainty about compliance with the FLSA—not in the case of "all employment issues" (EEAC Amicus Br. 22)—need reasonable inquiry or other steps be taken to avoid a willfulness finding. Nor is there a significant danger that willfulness disputes will center on whether an attorney's advice, if relied on, is "reasonable" (*ibid.*). The requirement that advice—attorney or otherwise—be "reasonable" means that a court must examine the advice as one factor in deter-

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Rodriguez, 668 F.2d 1376, 1379 n.4 (D.C. Cir. 1981); *Mumbower* v. *Callicott*, 526 F.2d 1183, 1187 n.5 (8th Cir. 1975); *Hodgson* v. *Humphries*, 454 F.2d 1279, 1284 (10th Cir. 1972).

[8] The EEAC asserts that our interpretation of "willful" in the limitations provision creates a conflict with the 29 U.S.C. 260 possible defense to liquidated damages (EEAC Amicus Br. 20-21), but offers no reason why the two provisions cannot operate harmoniously together under our interpretation, as we think they can (see Pet. Br. 33-37). See also Richards, *Monetary Awards in Equal Pay Act Litigation*, 29 Ark. L. Rev. 328, 340 (1975) (it "makes sense" to look to defenses in Sections 10 and 11 of the Portal-to-Portal Act for guidance in construing "willful" in the limitations context).

mining whether it was reasonable for an employer to have believed its pay practices were legal.[9]

For example, a court may conclude that advice correctly stating the law but assuming facts different from an employer's actual situation provides no reliable basis for the employer to believe its pay practices were legal. It should reach a similar conclusion if the employer relied on legal advice that expressly warned the employer of a risk of illegality. The standard we propose would not "shift the inquiry from whether the employer has violated the law to the employer's relationship with its lawyer" (EEAC Amicus Br. 23), but would give effect to the principle, well-established in criminal law, that " 'legal advice does not under all circumstances constitute an impregnable wall of defense.' " *United States* v. *Schaefer*, 299 F.2d 625, 631 (7th Cir.), cert. denied, 370 U.S. 917 (1962) (quoting *Linden* v. *United States*, 254 F.2d 560, 568 (4th Cir. 1958)).

CONCLUSION

The judgment of the court of appeals should be vacated.

Respectfully submitted.

CHARLES FRIED
Solicitor General

GEORGE R. SALEM
Solicitor of Labor

FEBRUARY 1988

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[9] The EEAC's fear of excessive intrusion into attorney-client confidences is unfounded. Common sense requires that an employer asserting reliance on an attorney's advice in structuring its pay practices be the source of the information as to what the advice was. It does not follow that any unrelated confidences disclosed by the employer to his lawyer will likewise have to be disclosed.

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AMICUS CURIAE

BRIEF

(5)

Supreme Court, U.S.
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No. 86-1520

In The Supreme Court of the United States

October Term, 1987

Dennis E. Whitfield, Deputy Secretary of Labor, United States Department of Labor,

Petitioner,

v.

Richland Shoe Co.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE RESPONDENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-1520

DENNIS E. WHITFIELD, DEPUTY SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

Petitioner,

v.

RICHLAND SHOE CO.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE RESPONDENT

The Equal Employment Advisory Council (EEAC or Council) respectfully submits this brief amicus curiae in support of the Respondent. The written consents of all parties have been filed with the Clerk of this Court.

INTEREST OF THE AMICUS CURIAE

EEAC is a nationwide association of employers and trade associations organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership comprises a broad segment of the business community.

Its governing body is a Board of Directors composed of experts and specialists in equal employment opportunity. Their combined experience gives the Council an unmatched depth of knowledge of the practical, as well as the legal aspects of equal employment opportunity programs and requirements. The members of EEAC are committed firmly to the principles of nondiscrimination and equal employment opportunity.

EEAC's members, and the constituents of its trade association members, are subject to the statutes directly at issue herein: the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.*, as well as the FLSA's statute of limitations, contained in Section 255(a) of the Portal-to-Portal Act, 29 U.S.C. § 255(a). Moreover, because several equal employment statutes, such as the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.*, and the Equal Pay Act, 29 U.S.C. § 206(d), also use the limitations provision contained in Section 255, EEAC's members have a vital interest in the issue presented herein: whether a finding of a "willful" violation under Section 255 requires a showing that the employer "knew or showed reckless disregard of whether its conduct was prohibited," the test adopted by this Court in the ADEA liquidated damages context. *See Trans World Airlines v. Thurston*, 469 U.S. 111 (1985). In fact, because of its interest in the issue, EEAC filed an amicus brief with this Court in *Thurston*, as well as with the Eleventh Circuit recently in *General Motors Corp. v. Glenn*, No. 87-7171 (decision pending), a case involving Section 255 and the Equal Pay Act.[1]

[1] Because of its interest in the application of the nation's civil rights laws, EEAC has filed briefs as amicus curiae in many cases before the United States Supreme Court, the United States Circuit Courts of Appeals and various state supreme courts. A number of the cases in which EEAC has participated as amicus curiae have involved the proper interpretation of the ADEA. *See, e.g., Western Air Lines, Inc. v. Criswell*, 105 S.Ct. 2743 (1985); *Lorillard v. Pons*, 434 U.S. 575 (1978); *Shell Oil Co. v. Dartt*, 434 U.S. 99 (1977); and *Burns v. Equitable Life Assurance Society of the United States*, 696 F.2d 21 (2d Cir. 1982), *cert. denied*, 104 S. Ct. 336 (1983).

In addition, EEAC is interested in the instant case because the Equal Employment Opportunity Commission (EEOC), the agency responsible for enforcing employment discrimination laws such as the ADEA and the Equal Pay Act, now is advocating a different definition of "willfulness" than it has in other cases. Previously, the EEOC supported the view that an action was willful if the employer simply knew the Act was "in the picture." *See Coleman v. Jiffy June Farms, Inc.*, 458 F.2d 1139, 1142 (5th Cir. 1971), *cert. denied*, 409 U.S. 948 (1972). The EEOC now has abandoned the *Jiffy June* standard, and has adopted the formulation advanced by the Solicitor herein, one that is quite different from that argued in the courts below.[2]

[2] The EEOC's adoption of the Solicitor's new standard is stated as follows:

> The Commission, in its litigation, has consistently supported the *Jiffy June* "in the picture" standard as an appropriate construction of the statute of limitations. The Commission has now decided that the standard we propose, under which a violation is willful if the employer acts without a reasonable basis for believing its acts are lawful, appropriately balances employees' interest in having an extra year to claim unlawfully withheld wages and employers' interest in avoiding undue liability for inadvertent violations. The Commission agrees that the

STATEMENT OF THE CASE

The Secretary of Labor ("Secretary" or "Government") brought suit against the Richland Shoe Co. ("Richland Shoe" or "the employer"), a Pennsylvania manufacturer of leather products, alleging violations of the overtime and recordkeeping provisions of the FLSA. In seeking a three year statute of limitations, the Secretary characterized Richland Shoe's nonpayment of overtime to eleven mechanics as "willful," which the Secretary defined as whether the employer knew the FLSA was "in the picture."

The district court granted the Secretary's motion for summary judgment, accepting a three year limitations period. 623 F. Supp. 667, 671. In doing so, the court adopted the *Jiffy June* "in the picture" standard, stating that such a standard "requires nothing more than that the employer has an awareness of the possible application of the FLSA." *Id.* This "awareness" was met, according to the district court, because Richland Shoe's general manager "was aware that the FLSA existed and that it governed overtime systems such as that used for the Richland mechanics." *Id.*

The Third Circuit overruled the district court's "in the picture" definition of "willful," and instead adopted the more "rigorous" definition that a violation is willful "if the employer knew or showed reckless disregard for the matter of whether its conduct was prohibited by the FLSA." 799 F.2d 80, 81. In doing so, the court reasoned that *Jiffy June* is "contrary to the plain meaning of the FLSA." *Id.* at 82.

Thurston standard should not be transposed into the statute of limitations context.

Br. at 14.

And noting that the Secretary's definition of willfulness would impose a three year statute "when the employer was merely negligent," the Third Circuit stated further that the *Jiffy June* standard "would frustrate legislative intent: because the standard is so lax that virtually any employer could be found to have acted willfully, the two-tiered scheme of liability that Congress evidently intended to implement would be eviscerated." *Id.* at 83. Finally, the appeals court noted "further [but not controlling] support" for its conclusion: this Court's refusal to adopt the *Jiffy June* standard in the ADEA liquidated damages context in *Thurston*.

In its Petition for a Writ of Certiorari at pp. 14-15, the Solicitor General ("Solicitor" or "Government") abandoned its *Jiffy June* standard, instead asking this Court to define willfulness as where the employer "is cognizant of an appreciable possibility that he may be subject to the statutory requirements and fails to take steps reasonably calculated to resolve the doubt." Requesting yet another standard in its brief on the merits at p. 41, the Government now argues that "an employer's violation should be held willful if the employer, recognizing it may be covered by the FLSA, acted without a reasonable basis for believing that it was complying with the statute."

SUMMARY OF ARGUMENT

This Court should affirm the decision of the Third Circuit below, which properly declined to extend the two-year statute of limitations to three because Richland Shoe did not commit a willful violation of the FLSA. In so affirming that result, this Court should adopt the definition of "willfulness" this Court has

already embraced in the ADEA liquidated damages context, whether an employer "knew or showed reckless disregard of whether its conduct was prohibited." *Thurston*, 469 U.S. 111, 126. This reckless disregard standard is consistent with the plain meaning of the FLSA, and is supported by the intent of Congress. Moreover, such a uniform definition of the term is important for consistent interpretation of the ADEA, FLSA and Equal Pay Act, since all share the same enforcement scheme.

In adopting this "reckless disregard" standard, this Court should thereby reject the standard proposed by the Government in the courts below, which would hold employers liable for willful behavior whenever a company official knew that the Act was "in the picture." *See Jiffy June*, 458 F.2d at 1142. As finally conceded by the Government at this late stage of appeal, such an "in the picture" standard is contrary to the plain meaning of the FLSA because it would, in effect, transform a "willful" standard into a simple negligence standard. In addition, it would turn a two-tiered statute of limitations into a single-tier statute, with nearly all employer behavior resulting in an extended statute of limitations.

Moreover, in adopting a "reckless disregard" standard in the FLSA context, this Court should reject the surprise standards the Government has advanced for the first time with this Court, notably the standard that would require employers to prove the "reasonable basis" of their actions to escape liability for willful behavior. Such a standard would drastically alter established burdens of proof, create internal conflicts between different provisions of the FLSA, and result in impractical and unwarranted results

for employers. Finally, if this Court does adopt the standard now proposed by the Government, simple fairness requires that its application be made prospective only. Retroactive application of such a new and different definition of a crucial statutory term would subject Richland Shoe to the unfair burden of having to defend against shifting standards, and would deny other employers a fair chance to analyze their responsibilities in light of what would amount to a new legal requirement.

ARGUMENT

I. THIS COURT SHOULD AFFIRM THE THIRD CIRCUIT'S FINDING THAT RICHLAND SHOE DID NOT COMMIT A WILLFUL VIOLATION BECAUSE THE COMPANY DID NOT ACT IN "RECKLESS DISREGARD" OF THE FLSA, AND THEREBY REJECT THE ARGUMENT THAT THE COMPANY COMMITTED A WILLFUL VIOLATION MERELY BY KNOWING THAT THE ACT WAS "IN THE PICTURE"

The Government has long advanced, and in fact argued in both the district and appeals court below, that an employer commits a willful violation of the FLSA whenever it can be shown that a company official knew that the Act was "in the picture." The Third Circuit below, however, rejected this "in the picture" definition, and instead adopted the more "rigorous" definition that a violation is willful "if the employer knew or showed reckless disregard for the matter of whether its conduct was prohibited by the FLSA." 799 F.2d 81. As a result, the Solicitor now concedes that its "in the picture" standard no longer applies to this case, Br. at 39, and instead seeks to have this Court redefine willfulness to mean that "the employer, recognizing it may be covered by

the FLSA, acted without a reasonable basis for believing that it was complying with the statute." *Id.* at 41.

As shown below, the *Jiffy June* "in the picture" standard is legally unsound, and the Solicitor's advancement of its "reasonable basis" standard conflicts with the policy considerations expressed by this and other courts. As a result, this Court should affirm the "reckless disregard" standard adopted by the Third Circuit below.

A. *Thurston* Defined "Willful" To Mean "Reckless Disregard" For Purposes Of The ADEA's Liquidated Damages Provision, Rejecting *Jiffy June's* "In The Picture" Standard And Expressing A Desire For A Uniform Construction Of The Term

To understand the reasons why this Court should adopt the "reckless disregard" standard in this case, it is essential to comprehend the use of the term "willful" in the relevant statutes, and the significance of *Thurston*'s attempt to establish a uniform meaning for the term. The Fair Labor Standards Act (FLSA) incorporates the statute of limitations contained in Section 255 of the Portal-to-Portal Act.[3] Section 255 provides a two year statute of limitations, but extends that period an extra year in cases of "willful" violations. Several other statutes, including the ADEA and the Equal Pay Act, share Section 255, but none of the statutes defines the term "willful."

[3] 29 U.S.C. § 255 provides in relevant part:

> Any action . . . to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act . . .
>
> (a) . . . may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, *except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued* . . . (emphasis added).

Before this Court decided *Thurston* in 1985, the circuits were split on the issue of what constitutes a willful violation under Section 255, with definitions ranging from the "in the picture" standard, *see Brock v. Georgia Southwestern College*, 765 F.2d 1026, 1039 (11th Cir. 1985), to the definition requiring "reckless disregard," like that adopted by the Third Circuit below, 799 F.2d 80, 83. In *Thurston*, however, this Court settled the issue for purposes of liquidated damages under the ADEA, and provided clear guidance for the consideration of the issue in the instant case.

Thurston involved the definition of willfulness, not under Section 255, but rather under the ADEA's provision for assessing liquidated damages.[4] The employees in *Thurston* argued that the *Jiffy June* standard should be adopted, making the employer liable for double damages if a company official knew that the ADEA was "in the picture." The Supreme Court, however, rejected the *Jiffy June* standard, stating:

> [I]t would be virtually impossible for an employer to show that he was unaware of the Act and its potential applicability. *Both the legislative history and the structure of the statute show that Congress intended a two-tiered lia-*

[4] The ADEA uses the Portal-to-Portal Act's defintion of "willfulness" for its statute of limitations, but also requires a showing of "willfulness" for liquidated damages. *See* Section 7(b), 29 U.S.C. § 626(b).

> *bility scheme.* We decline to interpret the liquidated damages provision of ADEA § 7(b) in a manner that frustrates this intent.

469 U.S. at 128 (footnote omitted; emphasis added). Instead, this Court adopted the following willfulness standard: whether "'the employer . . . knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA.'" *Id.* at 126, quoting *Air Line Pilots Ass'n v. Trans World Airlines*, 713 F.2d 940, 956 (2d Cir. 1983).

The Solicitor argues herein that *Thurston* does not apply to the instant case because the ADEA's willfulness standard for liquidated damages does not mean the same thing as the willfulness standard under Section 255. In fact, the Solicitor argues that courts should not use *Thurston*'s definition of the term, but instead should undertake a complicated "analysis of all the relevant factors," Br. at 21, every time the term is confronted by a court. This Court in *Thurston*, to the contrary, thought it important that the "definition of 'willful' . . . is *consistent* with the manner in which this Court has interpreted the term in *other* criminal and civil statutes." 469 U.S. at 126 (emphasis added).[5]

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[5] This Court in *Thurston* explained:

> The definition of "willful" adopted by the above cited courts is consistent with the manner in which this Court has interpreted the term in other criminal and civil statutes. In *United States v. Murdock*, 290 U.S. 389 (1933), the defendant was prosecuted under the Revenue Acts of 1926 and 1928, which made it a misdemeanor for a person "willfully" to fail to pay the required tax. The *Murdock* Court stated that conduct was "willful" within the meaning of this criminal statute if it was "marked by careless disregard [for] whether or not one has the right so to act." *Id.*, at 395. In *United States v. Illinois Central R. Co.*, 303 U.S. 239 (1938), the Court applied the *Murdock* definition of "willful" in a civil case. There, the defendant's failure to unload a cattle car was "willful," because it showed a disregard for the governing statute and an indifference to its requirements.

469 U.S. at 126-27 (Footnotes and some citations omitted.)

Moreover, *Thurston* emphasized that Congress had a "detailed knowledge of the FLSA" when it enacted the ADEA's willfulness requirement. 469 U.S. at 126. It is clear, therefore, that this Court's rejection of *Jiffy June*, and its desire for a uniform construction of the term "willful," provides persuasive support for an extension of the *Thurston* holding beyond the facts of that case.

B. This Court Should Cast *Jiffy June* Out Of The Picture, As Conceded By The Government Herein, And Should Instead Adopt A *Thurston* "Reckless Disregard" Standard For Computing The Appropriate Statute Of Limitations

The Supreme Court's reasoning in *Thurston*, in fact, applies with full force to the situation herein, calling not only for an acceptance of the Solicitor's concession that the "in the picture" standard no longer applies,[6] but a complete extension of the

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[6] The Solicitor concedes as follows:

> While we believe, as we have explained, that *Thurston*'s knowing or reckless disregard standard sets too high a threshold before employee recovery may be extended from two to three years under the FLSA statute of limitations, we also now believe that the *Jiffy June* "in the picture" standard sets too low a threshold. As this Court found in *Thurston* (469 U.S. at 128), the "in the picture" standard seems to give too little effect to Congress's express intent to create two tiers of liability in the FLSA limitations provision. Among employers even-

Thurston "reckless disregard" standard to Section 255. First, the *Jiffy June* standard is contrary to the plain meaning of the FLSA, while the *Thurston* definition is consistent with the Act. As the Third Circuit below stated:

> We believe that the *Jiffy June* standard is wrong because it is contrary to the plain meaning of the FLSA. Although the meaning of willful is not fixed and determinate, it is clear that willfulness is akin to intentionality. A willful act requires a deliberate effort, more than mere negligence. Webster's *New Collegiate Dictionary* 1331 (1979) defines "willful" to mean "done deliberately: intentional." The "words of statutes . . . should be interpreted where possible in their ordinary, everyday senses." *Malat* v. *Riddell*, 383 U.S. 569, 571 . . . (1966) (per curiam). At the very least a willful act requires reckless disregard of the consequences; there is no special, legal definition of the term.

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tually found to have violated the FLSA, it would seem that there are not many who did not know that the Act was "in the picture." It may be "virtually impossible for an employer to show that he was unaware of the Act and its potential applicability" (*ibid.*). In addition, the *Jiffy June* standard would impose a third year of liability even on those employers who firmly and reasonably (albeit wrongly) believe that their pay practices are lawful, a result that seems counter to the concerns expressed in the legislative process during the 89th Congress. Finally, in imposing the third year of liability on an employer as soon as it is aware that the FLSA is in the picture, the *Jiffy June* standard neutralizes the two-tier limitations scheme as a possible incentive for the employer to seek further advice about how to conform its practices to law. Br. at 39-40 (footnote omitted).

The Solicitor, instead, now advocates a "reasonable basis" standard. *See* Argument II, *infra*.

799 F.2d at 82 (footnote and partial citation omitted). This rationale is bolstered by this Court's finding that willfulness cannot be established "if the employer simply knew of the potential applicability of the ADEA." *Thurston* at 127.

The Solicitor disputes this line of reasoning, arguing that there is no "readily discernable meaning" of the term "willful." Br. at 18. The Solicitor's argument, however, is untenable for several reasons. First, the criminal cases it cites (*e.g.* "the term means 'with evil purpose, criminal intent or the like'" *Id.* at 16) are inapposite: no one is arguing that willfulness should require "premeditation" or "specific intent." Second, this Court in *Thurston* specifically stated that its definition of willful "is consistent with the manner in which this Court has interpreted the term in other criminal and civil statutes." 469 U.S. at 126. Clearly, therefore, "willful" means, at minimum, "intentional" or "deliberate." What is even *more* obvious is that it does not mean simple "negligence," the *Jiffy June* standard.

In addition, the *Jiffy June* standard would frustrate legislative intent of the FLSA and the Portal-to-Portal Act, while an adoption of the *Thurston* standard would support that intent. As the Seventh Circuit stated:

> The legislative history of the 1966 amendment to the Portal-to-Portal Act does not hint that "willful" was to carry an unusually diluted meaning. *The structure of the Act is the other way. Section 6(a) is designed to establish a two-tier statute of limitations, two years as a rule and three years in exceptional cases.* Treating "willful" as meaning no more than that "the act is in the picture" turns a two-tier statute into a one-tier statute.

Walton v. United Consumers Club, Inc., 786 F.2d 303, 310 (7th Cir. 1986) (emphasis added). This Court in *Thurston* explained: "As employers are required to post ADEA notices, it would be virtually impossible for an employer to show that he was unaware of the Act and its potential applicability. Both the legislative history and the structure of the statute show that Congress intended a two-tiered liability scheme. We decline to interpret the [statute] in a manner that frustrates this intent." 469 U.S. at 128. *See* R. Richards, *Monetary Awards in Equal Pay Act Litigation*, 29 Ark. L. Rev. 328, 338 (1975) ("The [in the picture] interpretation of willful seems clearly incorrect.").[7]

Indeed, as the Seventh Circuit stated in *Walton*, "every employer—except perhaps an employer fit for civil commitment—knows that the ADEA is 'in the picture.'" 786 F.2d at 309. If this Court adopts *Jiffy June*, "in the picture" knowledge "would lead to an automatic doubling of damages." *Id.* In fact, a 1980 article found that only one out of twenty-five

[7] In addition, adoption of the *Jiffy June* standard would defeat the clear intent of the liquidated damages provision of the Portal-to-Portal Act. As explained in Argument II of this brief, Section 260 of that Act permits an employer to show the "good faith" investigation of its statutory duties, thereby escaping the penalty of double damages. However, by *investigating* its duties under Section 260, the employer thereby *admits* that it knew the Act was "in the picture." The *Jiffy June* standard, therefore, creates a hidden disincentive for employers to comply with the Act in good faith. Moreover, such a disincentive to investigate its statutory duties obviously discourages voluntary compliance and settlement, a clear policy of this nation's discrimination laws. *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974). The standard that better serves these goals is, of course, the *Thurston* "reckless disregard" standard.

cases applying *Jiffy June* "found an employer's violation to be nonwillful." Note, *Standards of Willfulness Under the Fair Labor Standards Act*, 78 Mich. L. Rev. 626, 638 (1980). Clearly, therefore, *Jiffy June* is the incorrect standard.

True, *Thurston* dealt directly only with the ADEA's definition of willfulness for purposes of liquidated damages. But Congress, a body with "a detailed knowledge of the FLSA provisions and their judicial interpretation," *Thurston* at 126, certainly could not have intended willful to mean something different in the ADEA when that statute borrows the FLSA's "willful" provision for statute of limitation purposes. Moreover, this Court, while not specifically addressing the issue presented herein,[8] made clear its desire to construe the term willful "consistent with the manner [it] has interpreted the term in other criminal and civil statutes." *Id.* at 126. Such a rationale is especially important in transposing the *Thurston* "reckless disregard" standard from the ADEA to this context, since both laws involve the "same concerns." *Id.* at 128.

Other circuits, in addition to the Third below, have extended *Thurston*'s holding beyond the ADEA's liquidated damages context. Those Circuits have looked to the *reasoning* in *Thurston*, which goes beyond that case's specific holding, and which lends persuasive support to the instant consideration. For example,

[8] The Supreme Court stated:

> Even if the "in the picture" standard were appropriate for the statute of limitations, the same standard should not govern a provision dealing with liquidated damages.

469 U.S. at 127-128 (footnote omitted).

the Fifth Circuit in *Peters v. City of Shreveport*, 818 F.2d 1148, 1167-68 (1987), stated:

> While *Thurston* can be distinguished on the ground that it interprets a distinct provision of a related statute, *Thurston*'s rejection of *Jiffy June*'s "in the picture" standard as too broad an interpretation of the word "willful" in the ADEA argues strongly that "willful" should receive a similar interpretation in the FLSA. *See Brock* v. *Richland Shoe Co.* . . . (court declines to adopt *Jiffy June* as a matter of first impression because *Thurston* argues forcefully that *Jiffy June*'s standard is too broad); *Walton* . . . (*Thurston* and the legislative history of the FLSA limitations provision argue strongly against the adoption of *Jiffy June*'s "in the picture" standard). A doctrine often questioned in this circuit, . . . Jiffy June's "in the picture" standard was finally put to rest by *Thurston*. (Footnote and citations omitted).[9]

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[9] In its brief at p. 38, the Government erroneously calls the *Jiffy June* standard a majority rule. In fact, only the First, Fourth and Tenth Circuits have adopted the rule. *See Secretary of Labor v. Daylight Dairy Products, Inc.*, 779 F.2d 784 (1st Cir. 1985); *Donovan v. Bel-Loc Diner, Inc.*, 780 F.2d 1113, 1117 (4th Cir. 1985); *Crenshaw v. Quarles Drilling Corp.*, 798 F.2d 1345 (10th Cir. 1986).

Four other circuits, however, have clearly *rejected* the *Jiffy June* standard. *See Peters*, 818 F.2d at 1168 (5th Cir. 1987) ("*Thurston's* rejection of *Jiffy June* . . . argues strongly that 'willful' should receive a similar interpretation under the FLSA"); *Brock v. Richland Shoe Co.*, 799 F.2d at 83 (3d Cir. 1986) (*Thurston* provides persuasive support for adoption of the reckless disregard standard); *Walton v. United Consumers Club, Inc.*, 786 F.2d 303, 308-11 (7th Cir. 1986) (*Thurston* provides one definition for a willful violation of the FLSA and the ADEA); *Nolting v. Yellow Freight System, Inc.*, 799 F.2d 1192, 1197 (8th Cir. 1986) (rejecting *Jiffy June*, and adopting a "knew or suspected" standard.)

Other circuits simply have not accepted or rejected *Jiffy June*, or have not addressed the statute of limitations definition of "willfulness" in light of *Thurston*. *See Brock v. Georgia Southwestern College*, 765 F.2d 1026 (11th Cir. 1985) (did not mention *Thurston*); *Donovan v. Carls Drug Co., Inc.*, 703 F.2d 650, 652 (2d Cir. 1983) ("(1) [employers] know that their business is subject to FLSA and (2) their practices do not conform to FLSA requirements"); *Marshall v. Union Pacific Motor Freight Co.*, 650 F.2d 1085, 1092 (9th Cir. 1981) ("A violation is willful when the employer was, or should have been, cognizant of an appreciable possibility that the employees involved were covered by the statutory provisions."); *see also Brock v. Shirk*, No. 86-4121 (9th Cir. Dec. 8, 1987); *Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429, 459-63 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978) (discussing but reserving issue).

Similarly, this Court should find "no basis for cloaking willful with different meanings in the liquidated damages and statute of limitations contexts." *EEOC v. Westinghouse*, 646 F.Supp. 555, 562 (D. N.J. 1986).

Accordingly, this Court should adhere to *Thurston's* preference for a "consistent construction" of the term "willful," reject the *Jiffy June* standard, and adopt the reckless disregard standard for purposes of Section 255.

II. THIS COURT SHOULD REJECT THE GOVERNMENT'S SURPRISE NEW "REASONABLE BASIS" STANDARD BECAUSE IT WOULD BE UNFAIR TO RICHLAND SHOE AND IMPRACTICAL FOR EMPLOYERS GENERALLY

As stated above, the Government, in its Petition for a Writ of Certiorari, abandoned its *Jiffy June* standard, instead asking this Court to redefine willfulness to mean that the employer "is cognizant of an appreciable possibility that he may be subject to

the statutory requirements and fails to take steps reasonably calculated to resolve the doubt." Requesting yet another version of this standard in its brief on the merits at p. 41, the Solicitor now argues that "an employer's violation should be held willful if the employer, recognizing it may be covered by the FLSA, acted without a reasonable basis for believing that it was complying with the statute."

As shown below, these repeated changes in the Government's position have unjustly required Richland Shoe to spend unreasonable amounts of resources to defend its actions under shifting standards. Moreover, adoption of the "reasonable basis" standard by this Court would improperly shift the burden of proof from plaintiffs to employers, and lead to impractical and unwarranted results.

A. The Government's Proposed "Reasonable Basis" Definition Would Improperly Convert The Plaintiffs' Burden To Prove "Willfulness" Into A Burden On Employers To Prove "Non-Willfulness," Create Internal Conflicts Between Different Provisions Of The FLSA, And Lead To Impractical And Unwarranted Results For Employers

This Court should reject the Solicitor's "reasonable basis" standard, which would define "willful" to mean that an "employer, recognizing that it may be covered by the FLSA, acted without a reasonable basis for believing that it was complying with the statute." Br. at 41.[10]

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[10] The Solicitor's proposed standard, in full, states:

> A standard based on the formulation in *Laffey* [*v. Northwest Airlines, Inc.*, 567 F.2d 429 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978)] and akin to the standard found in 29 U.S.C. 260, we believe, results in the most appropriate interpretation of the FLSA's limitation provision. Specifically, an employer's violation should be held willful if the employer, recognizing it may be covered by the FLSA, acted without a reasonable basis for believing that it was complying with the statute. Such a basis may be absent because the employer failed to seek a reliable determination of its obligations under the FLSA or because the advice it received afforded no sound basis for eliminating existing uncertainties about the employer's compliance.

Br. at 41.

First, this Court should reject the "reasonable basis" standard because it, improperly, would shift the burden of proof from plaintiffs to employers. Traditionally, of course, plaintiffs carry the burden under Section 255 of showing that an employer's actions were "willful." In fact, courts have dismissed allegations of willful violations where "plaintiffs did not carry their burden of showing willfulness." *Peters v. City of Shreveport*, 818 F.2d 1148 at 1167; *see EEOC v. Westinghouse*, 646 F. Supp. 555 at 562.

A close examination of the Solicitor's proposed standard, however, reveals that *plaintiffs* would no longer have the burden of proof. Rather, *employers* who "knew that there was an appreciable possibility" that the Act applied would have to prove as follows:

> With respect to such an employer, *the inquiry should turn to whether the employer took steps to determine its legal obligations and to fulfill them.* If the employer took no such steps, it should be obligated to compensate its employees for the third year of its illegal pay practices . . . On the other hand, *a defense to an alleged "willful violation" should be available to an employer that can prove that it took steps* reasonably calculated to resolve the doubt as to the validity of

> its employment practices *and relied on reasonable advice eliminating uncertainties as to the legality of its pay practices.*

Br. at 41-42 (emphasis added). Clearly, the Solicitor's standard would result in a drastic "burden shifting," from plaintiffs proving willfulness to employers proving "non-willfulness." Such a dramatic overruling of precedent, thus, should be rejected.

The Solicitor justifies its proposed rewriting of burden of proof case law because "the risk of error should be borne by the employer," Br. at 22, 43. But this so-called logic turns the statute of limitations on its head. As recognized by several courts, including *Thurston* at 128, Congress drafted Section 255 to be a two-tier statute, with two years the norm and three the exception. Making employers bear "the risk of error" by presuming a three year statute unless employers can prove that they "took steps" to resolve any doubt, and that they "relied on reasonable advice," inverts the law's meaning. It creates an almost *per se* liability standard, which the Department of Labor and the EEOC undoubtedly will allege in most cases, and which employers will find nearly impossible to disprove.

The Solicitor's proposed standard, in addition, creates an internal conflict between two distinct provisions of the Portal-to-Portal Act. Specifically, the Solicitor relies on Section 260 of the Portal-to-Portal Act (governing liquidated damages for the FLSA and the Equal Pay Act, but not the ADEA) for its "reasonable basis" standard.[11] But, as is obvious

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[11] Section 260 provides:

> In any action . . . to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, *if the employer shows* to the satisfaction of the court that the act or omission giving rise to such action was in good faith and *that he had reasonable grounds* for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, *the court may, in its sound discretion, award no liquidated damages*, or award any amount thereof not to exceed the amount specified in section 216 of this title. (Emphasis added).

from the text of Section 260, it is written much differently than Section 255. Section 260 presumes that an employer is liable for liquidated damages unless it can show that its failure to obey the statute was: (1) in good faith; and (2) predicated upon such reasonable grounds that it would be unfair to impose more than a "compensatory burden." *Barcellona v. Tiffany English Pub, Inc.*, 597 F.2d 464 (5th Cir. 1979). Section 255, as shown above, presumes that an employer has not acted "willfully" unless the plaintiff proves to the contrary.

Accordingly, adoption of the Solicitor's standard would create internal conflicts within FLSA, because Section 255, the "willful" statute of limitations provision, would have to be read in conjunction with the requirements contained in a completely unrelated provision—Section 260, the "good faith" liquidated damages provision. It is interesting to note that the Solicitor has no trouble rationalizing a similar interpretation for two wholly unrelated terms ("willful" and "good faith") yet it resists a uniform definition for the term "willful," even though that term has "shared understandings" in several laws.[12]

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[12] It is even more interesting to note that the Solicitor argued just the opposite in its brief to this Court in *Thurston*. There, the Solicitor stated:

> Equally well-recognized is the "natural presumption that identical words used in different parts of the same Act

Walton, 786 F.2d at 310. In fact, *Thurston* expressed such an interest in consistent interpretation of similar words in related statutes. 469 U.S. at 126. As established fully in Argument I A, *supra*, "willfulness" should be construed to mean the same under similar employment statutes, especially for purposes of this case, where the FLSA, ADEA and Equal Pay Act all share the same provision.

In addition, this Court should reject the Solicitor's "reasonable basis" standard because of the impractical and unwarranted consequences imposed upon employers. First, requiring an employer to prove that it "took steps" to resolve all "doubt" about its employment practices—*i.e.*, to get a legal opinion from its attorneys—would be unwarranted. Companies simply should not be required to present all employment issues to their lawyers. In fact, courts have determined that "to require an employer to seek legal advice before taking any employment action" would be "entirely unreasonable." *Gilliam v. Armtex, Inc.*, 820 F.2d 1387, 1390 (4th Cir. 1987).

Moreover, the Solicitor's standard not only would require employers to get legal opinions on virtually all employment issues raised in the workplace, but also would put the onus upon employers to prove that those opinions were, in fact, reasonable. The major issue under the proposed standard, then, would be what is "reasonable advice." In the real world, when

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are intended to have the same meaning." *Atlantic Cleaners & Dyers v. United States, Inc.*, 286 U.S. 427, 433 (1932). See 2A C. Sands, *Sutherland Statutes and Statutory Construction* § 51.08 & n.6 (4th ed. 1973).

Solicitor General, Brief for the Equal Employment Opportunity Commission at 33.

companies do rely on their attorneys for advice on whether their practices (or other EEO policies) could violate the law, they usually rely on this legal advice without conducting their own, independent legal research or attempting to make their own legal judgments. If companies now must prove not only that they sought legal advice, but that the advice they received was reasonable, and "assume the risk"" of that advice, employers will be less likely to rely on their attorneys and more likely to attempt their own legal research and analysis. This certainly does not make practical sense; indeed, it is more likely to encourage corporate behavior that is ill-founded and unwise. Moreover, adoption of the Solicitor's standard would shift the inquiry from whether the employer has violated the law to the employer's relationship with its lawyer.

In addition to placing the impossible burden on employers to disprove willfulness, the Solicitor's standard would force employers who advance this defense to completely waive the attorney-client privilege. The Solicitor, in fact, cites a century-old case[15] for the proposition that an employer "must

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[15] The Solicitor cites *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888), *In re Continental Illinois Securities Litigation*, 732 F.2d 1302, 1314-1315 & n.20 (7th Cir. 1984) and *United States v. Woodall*, 438 F.2d 1317, 1324 (5th Cir. 1970) (en banc), *cert. denied*, 403 U.S. 933 (1971) for its automatic waiver argument. The cases provide little support, however, since *Continental Illinois*, a Securities Act case, declined to find complete waiver, noting that there is a stronger argument for protecting corporate privileges "where absolute confidentiality has been maintained." 732 F.2d at 1314. *Hunt*, a case decided one hundred years ago, involved waiver of the privilege after a dispute arose between the client and the attorney —the client waived her right to object to the attorney's giving his own version of the dispute. *Woodall*, moreover,

be held to have waived" its privilege whenever it tries to show the "reasonableness" of its actions. Br. at 43 n.27 (emphasis added). Clearly, however, employers should not be put between Scylla and Charybdis: they should not have to reveal the content of their communications with their lawyers to the Government or opposing private counsel, or else be held liable for a three year statute of limitations.

There will be yet another anomolous result should this Court adopt the Solicitor's argument that "willfulness" under one part of the ADEA does not necessarily mean the same thing as "willfulness" in other EEO laws: it will be easier for a plaintiff to get an extended limitations period (governed by the "willfulness" standard) than it will to get liquidated damages (which are presumed absent "good faith").[24]

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asked the central question—"Does the person holding the right to claim the privilege intend to waive it?" 438 F.2d at 1324. Here, the Solicitor would not ask whether the corporation intended to waive—it would *force* the waiver. In fact, some of the *Twentieth* Century cases regard waiver of the privilege point in the opposite direction. One court found that the privilege was not lost when confidential information was intermingled with nonconfidential general files, making the documents readily accessible to corporate employees. *James Julian, Inc. v. Raytheon Co.*, 93 F.R.D. 138, 142 (D. Del. 1982). The court noted that the privilege was not destroyed because the documents were not broadly circulated, but simply indexed and filed. The court stated "[t]o hold otherwise would be to require *every* corporation to maintain at least two sets of files," as well as institute expensive and impractical screening devices to prevent accidential in-house reading of confidential materials by employees who have neither access nor need. *Id.*

[24] In fact, the Seventh Circuit in *Walton* stated the point well as follows:

This same line of argument applies with full force to another of the Solicitor's arguments, that a three-year statute of limitations is needed for policy reasons: to allow the Department of Labor to challenge unlawful pay practices, and that potential plaintiffs may at first be reluctant to pursue their rights. Br. at 12, 33, 37 n.22. Such policies, however, do "not exist in a vacuum." *Walton*, 786 F.2d at 310. *Id.* In fact, the ADEA and the Equal Pay Act give charging parties *only up to 300 days* to file their claims with the EEOC. *See, e.g.*, 29 U.S.C. § 626(d). Clearly, Congress decided to put some limitation on the time plaintiffs have to file their claims.

Similarly, this Court should not accept the Solicitor's arguments that the reasonable basis standard is warranted, in part, because the FLSA is a

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> The upshot of a decision such as *Daylight Dairy* is that the plaintiff has an easier time extending the statute of limitations than collecting double damages. . . Both *Daylight Dairy* and *Bel-Loc* rely on notions of good public policy—that it *ought* to be easier to extend a statute of limitations than to collect double damages. But "good" policy could go either way. Trebling of damages in antitrust is automatic, while the statute of limitations is not readily extended. . . Neither *Daylight Dairy* nor *Bel-Loc* discusses the language or structure of the FLSA, and this is a serious shortcoming. "Policy" does not exist in a vacuum. We need to search for "what Congress meant *by what it said*, rather than for what it meant *simpliciter*." Courts should confine their attention to the purposes Congress sought to achieve by the words it used. We interpret texts. The invocation of disembodied purposes, reasons cut loose from language, is a sure way to frustrate rather than implement these texts.

786 F.2d at 309-310 (emphasis in original; citation omitted).

"remedial" statute. Br. at 33. As Seventh Circuit in *Walton* stated:

> It is true, as the Fifth Circuit said in *Jiffy June* . . . that the "entire legislative history of the 1966 amendments of the FLSA indicates a *liberalizing intention* on the part of Congress." Three years is more "liberal" than two. But the *direction* of the change (in favor of employees) does not tell us *how far* the change was to go . . . Legislation is compromise. Every statute has a stopping point. Even if all of the legislative history points in one direction, it is still necessary to find the compromise to learn the meaning of the statute. . . . The court did not cite in *Jiffy June* any particular legislative history suggesting that Congress meant three years to become the norm and two years the exception; it did not cite any history suggesting that Congress meant to make it easier to extend the statute of limitations than to obtain double damages; so far as our research reveals, there is no such legislative history on which to rely.

786 F.2d at 310-311 (partial emphasis added; citations omitted).

As a result, this Court should reject the Solicitor's reasonable basis standard, and instead use the *Thurston* reckless disregard standard for purposes of this case.

B. Because The Government's Advancement Of New Definitions Of "Willfulness" Has Required Employers To Spend Significant Resources To Defend Their Conduct Under Shifting Standards, Any Imposition Of Liability Should Be Prospective Only

In the courts below, Richland Shoe was required to spend significant resources proving that its actions were not willful under the "in the picture" standard. After it won in the Third Circuit, and even though it claimed that it could no longer afford to litigate, the company still had to spend additional sums preparing a Brief in Opposition to A Writ of Certiorari, this time arguing that its actions were not willful under the "appreciable possibility" standard. Now, Richland Shoe is being forced to spend significant amounts of time and money proving that its actions were not willful under the Solicitor's new "reasonable basis" standard.

Obviously, the Government knows that it cannot win this case with its "in the picture" definition due, in part, to *Thurston*'s discrediting of *Jiffy June*. As a result, the Solicitor is now advancing a series of shifting arguments, attempting a "backdoor" strategy to get around the specific holding in *Thurston*. But the Solicitor's advancement of such different standards, two of which were not even raised in the courts below, has resulted in an unfair burden upon Richland Shoe—the forced defense of a standard that should not even be in this case. As a result, if this Court adopts the Solicitor's "reasonable basis" standard, it should not impose liability retroactively, and Richland Shoe thus should not be forced to expend additional resources defending this case.

Moreover, if this Court adopts any standard other than a *Thurston* or a *Jiffy June* standard (the two standards raised below), simple fairness requires that application of that new standard be made prospective only. Most emplyoers are completely unaware of the Solicitor's new standard, and few employers, it is fair to say, have even contemplated their exposure under this definition, either in terms

of investigating their pay practices or second-guessing their own lawyers. *See* Argument II A, *supra*.

Such an argument for "prospective application" of any new rule draws support from previous decisions of this Court. For example, in *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975), this Court held that backpay may be denied when the denial would not frustrate the central purpose of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination. The Court in *Albemarle* also held that backpay was not to be awarded automatically in every case. *Id.* at 424. In *City of Los Angeles v. Manhart*, 435 U.S. 702 (1978), this Court, in denying a retroactive backpay award in a pension contribution case, relied upon the fact that "the administrative agencies had conflicting views," *id.* at 720 and n.37, that the City "reasonably could have thought it unfair—or even illegal—to make male employees shoulder more than their 'actuarial share' of the pension burden," *id.*, and that the legal theory upheld "represent[ed] a marked departure from past practice." *Id.* at 722; *see also Arizona Governing Committee v. Norris*, 463 U.S. 1073, 1094-95, 1109-11 (1983).

Accordingly, because of the unfairness of the Solicitor's shifting standards for Richland Shoe, and because of the inequities that any retroactive application would have on employers in general, this Court's adoption of any standard other than a *Jiffy June* or a *Thurston* should be prospective only.

CONCLUSION

For the foregoing reasons, the amicus respectfully submits that the Third Circuit's decision should be affirmed.

Respectfully submitted,

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